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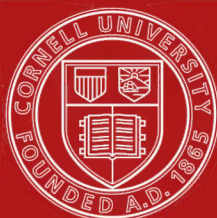
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COMPANY LAW
COMMENTARIES
ON THE LAW OF
PRIVATE CORPORATIONS
WHETHER
WITH OR WITHOUT CAPITAL STOCK,
ALSO OF
JOINT-STOCK COMPANIES
AND OF ALL THE
VARIOUS VOLUNTARY UNINCORPORATED ASSOCIATIONS
ORGANIZED FOR PECUNIARY PROFIT OR
MUTUAL BENEFIT.

BY
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COMMENTARIES

ON THE LAW OF

PRIVATE CORPORATIONS.

THE LAW OF CORPORATIONS.

CHAPTER XX.

INCIDENTAL CORPORATE POWERS.

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§ 385. **Introductory.**— An incidental power is one that is directly and immediately appropriate to the execution of the specific powers expressly granted,¹ and is bounded by the purpose of the corporate enterprise and by the terms and intention of the charter.² This binds corporations to the exercise of

¹ *People v. Chicago Gas Trust Co.*, (1889) 130 Ill. 268; *s. c.* 7 Ry. & Corp. L. J. 23; *Hood v. New York & C. R. Co.*, 22 Conn. 1; *Franklin Co. v. Lewiston Sav. Inst.*, 68 Me. 43.

² *Utica Ins. Co. v. Scott*, 19 Johns. 1; *Ohio v. Washington Library Co.*, 11 Ohio, 96; *People v. Utica Ins. Co.*, 15 Johns. 358; *Korn v. Mutual Assur. Soc.*, 6 Cranch, 192; *New York Ins.*

their powers over their respective members for the accomplishment of limited and well defined objects.¹ But corporations, within the scope of their authority, have all the powers of ordinary persons.² And unless prohibited by charter they have the power to make any contract requisite for the purposes of their creation.³

Co. v. Ely, 5 Conn. 560, where loaning money was held not necessary to effectuate the business of insurance; *Gozzler v. Georgetown*, 6 Wheat. 593; *Utica Bank v. Smedes*, 6 Cowen, 684; *McMullen v. City Council*, 1 Bay, 46; *Mayor of Jonesboro v. McKee*, 2 Yerg. 167; *Webb v. Manchester*, 4 Mylne & C. 116; *Pearce v. New Orleans Bldg. Co.*, 9 La. 395 and 461; *Stewart v. Stebbins*, 1 Stew. (Ala.) 299; *State v. Mayor of Mobile*, 5 Port. (Ala.) 279; *Betts v. Menard*, 1 Breese, 10; *Jackson v. Brown*, 5 Wend. 590; *Ohio Ins. Co. v. Merchants' Ins. Co.*, 11 Humph. 1, in which case the distinction between incidental powers exercised as a means necessary and proper for executing the purposes granted, and incidental powers which should amount to an inclusion of another object or business, which is of course prohibited, was clearly brought out; *Sumner v. Marcy*, 3 Woodb. & M. 105; *Bangor Boom Co. v. Whiting*, 29 Me. 123; *Perrine v. Chesapeake Canal*, 9 How. 172; *Blanchard Gunstock Co. v. Warner*, 1 Blatch. 258; *Trustees v. Peaslee*, 15 N. H. 317; *Chicago R. Co. v. Wilson*, 17 Ill. 123; *Curtis v. Leavitt*, 15 N. Y. 9, 60. In this last case Comstock, J., held that borrowing money was incidental to the banking business, and also borrowing capital. "An individual banker may certainly do this. So can a partnership which has no corporate privileges. And why then can not a partnership which has power to incorporate it-

self and does so under the general law? Corporations, it is said, can act only in accordance with the law which creates them. But if the law authorizes them to do acts specifically, and is silent as to the manner and means of doing those acts, where is the restriction, except such as the nature of the business implies? Banking, I repeat, is a business and not a franchise. The public have a special concern in the circulation only, and that is guarded in the act of 1838 by a series of very peculiar and exact provisions. Beyond that, I have no doubt the legislature intended to leave the business essentially free. It allowed all persons to associate, to become incorporated by their own act, and it conferred the most ample banking powers, without a single restriction in the use of those powers."

¹ *Spaulding v. Lowell*, 23 Pick. 71, 75.

² *Deringer's Adm'r v. Deringer's Adm'r*, (1878) 5 Houston, 416; s. c. 1 Am. St. Rep. 150. And, in this case, it was held that a corporation may be trustee both of realty and personalty, and its authority as a trustee is the same as that of an individual so acting. And so a corporation, all of whose members are citizens of the United States, is competent to locate a mining claim. *Thomas v. Chisholm*, (1889) 13 Colo. 105.

³ *Deringer's Adm'r v. Deringer's Adm'r*, (1878) 5 Houston, 416; s. c. 1 Am. St. Rep. 150. Mr. Wood states the matter thus: It would be impossible

§ 386. **Extended powers now given by statute.**—Besides the extension by way of incidental powers, general laws are now very comprehensive, so that corporations can scarcely fail to find statutory expressions under which they may accomplish their purposes. Thus certain laws under the expression “or other lawful business,” authorize the formation of corporations for carrying on any kind of lawful business, for pecuniary profit, not elsewhere specially provided for, although not of the same kind as any of those previously enumerated in the enabling act.¹ And a corporation formed for buying, selling, and dealing in real estate, live-stock, bonds, securities, and other properties of all kinds, on its own account and for commission, may be incorporated under an act which provides that a corporation may be created for the purposes therein enumerated, and for any other purpose intended for mutual profit or benefit not otherwise specially provided for, and consistent with the constitution and laws of the State.²

to specify or enumerate in a charter all the acts which a corporation may perform; accordingly it is left for the courts to say what powers, as incident to those granted, the corporation may be deemed to possess; looking at the actual powers and the purposes of the grant, the courts uphold all acts which are necessary to give effect thereto. *Wood's Railway Law*, 467. To this effect are many cases, including *The Central R. & B. Co. of Georgia v. Collins*, 40 Ga. 582; *Mobile &c. R. Co. v. Franks*, 41 Miss. 494; *Baltimore v. Baltimore &c. R. Co.*, 21 Md. 50; *State v. Baltimore &c. R. Co.*, 6 Gill, (Md.) 363; *Davis v. Old Colony R. Co.*, 131 Mass. 256; s. c. 41 Am. Rep. 221; *Commonwealth v. Erie &c. R. Co.*, 27 Pa. St. 339; s. c. 67 Am. Dec. 471; *Delaware &c. Canal Co. v. Camden &c. R. Co.*, 16 N. J. Eq. 321; *Morris Canal &c. Co. v. Central R. Co.*, 16 N. J. Eq. 419; *Morris &c. R. Co. v. Sussex R. Co.*, 20 N. J. Eq. 542, where corporations were held to contract

within the existing powers of their charters; *Hurlbut v. Marshall*, 62 Wis. 590; *Attorney-General v. Great Eastern Ry. Co.*, L. R. 5 App. Cas. 473. See, also, *Railway Co. v. McCarthy*, 96 U. S. 258; *Green Bay &c. R. Co. v. Steamboat Co.*, 107 U. S. 98, Gray, Justice, saying: “The general doctrine is now well settled, the charter of a corporation, read in connection with the general laws applicable to it, is the measure of its powers, and a contract manifestly beyond those powers will not sustain an action against the corporation. But whatever, under the charter and other general laws, reasonably construed, may fairly be regarded as incidental to the objects for which the corporation is created, is not to be taken as prohibited.”

¹ *Brown v. Corbin*, (1889) 40 Minn. 508; Minn. G. S. 1866, c. 34, § 45, as amended by Laws 1873, c. 13.

² *National Bank v. Texas Investment Co.*, (1889) 74 Tex. 421; Tex. Rev. Stat. art. 566, and subdiv. 27.

So where no corporation can be organized under a certain law, except for an exclusively manufacturing or mechanical business, if the purpose for which a corporation is formed, as stated in its articles of association, is to carry on a manufacturing or mechanical business, and to purchase the stock and evidences of indebtedness of an insolvent corporation, it will belong to the class of corporations authorized to be formed under another law providing for the organization of companies for the purpose of carrying on any lawful business, although the articles recite that it is formed under the former law.¹ But an act defining the rights of companies incorporated for the manufacture of gas, or the supply of light to the public by any other means, and conferring upon such companies power to enter upon the public streets for the purpose of laying pipes, but not for the purpose of erecting poles and placing wires, does not embrace electric-light companies.² Though it has been held that the charter of a company, incorporated to carry on an iron furnace, by implication confers the power to keep a "supply store" connected therewith.³ And it is also held that a corporation whose object is to mine lime-stone, and to manufacture and sell lime, with power to buy and hold real or personal property, in such amounts as it may deem necessary to accomplish the purposes of its creation, can not purchase goods, to be resold, except to carry on a supply store, or otherwise aid in its principal business.⁴

§ 387. Incidental powers of banks.—A bank, like other private corporations, is confined to the sphere of action limited by the terms and intention of the charter.⁵ It is not

¹ *State v. Minnesota &c. Co.*, (1889) 40 Minn. 213.

² *Appeal of Scranton Electric Light &c. Co.*, (1888) 122 Pa. St. 154.

³ *Searight v. Payne*, 6 Lea, 283.

⁴ *Chewacla Lime-Works v. Dis-
mukes*, (1889) 84 Ala. 344.

⁵ *Weckler v. First Nat. Bank of
Hagerstown*, (1875) 42 Md. 581; s. c. 14 Am. Law Reg. 609, approving *Bank of the United States v. Dandridge*, 12 Wheat. 68, where it is said: "Whatever may be the implied pow-

ers of aggregate corporations by the common law, and the modes by which those powers are to be carried into operation, corporations created by statute must depend, for theirs and the mode of exercising them, upon the true construction of the statute itself." The law more at large is stated in the principal case to be in Maryland, that a corporation created for a specific purpose not only can make no contract forbidden by its charter, but in general

therefore within the scope of the powers of national banks to carry on the business of selling bonds on commission.¹ It is not in any wise necessary to the purpose of their existence, or in any sense incidental to the business they are empowered to conduct, that they should become bond brokers or be allowed to traffic in every species of obligations issued by the innumerable corporations, private and municipal, of the country.² It has even been decided that national banks have no power to bind themselves or the corporators, by accepting bonds, coin, or other valuable things, upon special deposit, for safe keeping and return on demand, and no recovery can be had against the bank for any such deposit left with the cashier and not returned on request.³ But a banking company, it was recently decided in England, could make payment of an annuity to the family of a deceased superintendent, for, it was said, that the act was conducive to the interests of the company.⁴

can make no contract which is not necessary either directly or indirectly to enable it to answer that purpose. In deciding, therefore, whether a corporation can make a particular contract, it must be considered, in the first place, whether its charter or some statute binding upon it forbids or permits it to make such a contract; and if its charter and the statutory law are silent upon the subject, in the second place, whether the power to make such a contract may not be implied upon the part of the corporation as directly or incidentally necessary to enable it to fulfill the purpose of its existence; or whether the contract is entirely foreign to its purpose. A corporation has no other powers than such as are specifically granted or such as are necessary for the purpose of carrying into effect the powers expressly granted. *Pennsylvania & Co. v. Dandridge*, 8 Gill & J. 318.

¹ *Weckler v. First Nat. Bank of Hagerstown*, (1875) 42 Md. 581; s. c. 14 Am. Law Reg. 609, citing *Tal-*

madge v. Pell, 7 N. Y. 328; *Fowler v. Scully*, 72 Pa. St. 456; *Shrickle v. First Nat. Bank of Ripley*, 22 Ohio St. 516; *Wiley v. First Nat. Bk. of Brattleboro*, (1875) 47 Vt. 456; s. c. 14 Am. Law Reg. 342; *First Nat. Bank of Lyons v. Ocean Nat. Bank*, (1875) 60 N. Y. 278.

² *Weckler v. First Nat. Bank of Hagerstown*, (1875) 42 Md. 581; s. c. 14 Am. Law Reg. 609. The judge goes on to say that the more carefully they confine themselves to the legitimate business of banking, as defined in the law, the more effectually they will subserve the purposes of their creation. By a strict adherence to that they will best accommodate the commercial community, as well as protect their stockholders.

³ *Wiley v. First Nat. Bank of Brattleboro*, (1875) 47 Vt. 456; s. c. 14 Am. L. Reg. 342, distinguishing *Foster v. Essex Bank*, 17 Mass. 497.

⁴ *Henderson v. Bank of Australasia*, (1888) 40 Ch. Div. 170; s. c. 4 Ry. & Corp. L. J. 214.

§ 388. **The power to mortgage property.**—The power to borrow carries with it by implication, unless restrained by charter, the power to secure the loan by mortgage,¹ a corporation having power generally to mortgage its property in order to raise money to carry on its business.² And, though there be no express power given to a corporation in its charter to borrow money on mortgage, but power is conferred upon its directors to make all necessary contracts, and to sell or otherwise dispose of any portion of its property whenever in their judgment it shall be found to be to the interest of the company, the exercise of the power to borrow, and to secure the loan by mortgage from the company, is valid.³ So further, the power of a corporation to pledge securities owned by it for the payment of its debts, is included in the power to sell such securities for that purpose.⁴ And moreover a deed by a manufacturing corporation to secure the individual indebtedness of its president, is held not to be *ultra vires* where it is itself indebted to him in like amount.⁵ The mortgage must be made by the proper authorities, however, if it is to be valid.⁶ A mortgage, when given by a corporation for more than one-half the stock actually paid in, is not *ultra vires* and invalid, although the giving of such mortgage is forbidden by the articles of incorporation.⁷ In a case, however, where a

¹ Wright v. Hughes, (1889) 119 Ind. 328; s. c. 12 Am. St. Rep. 412; Commissioners v. Atlantic & C. R. Co., 77 N. C. 289.

² Lehigh Valley Coal Co. v. West Depere Agricultural Works, (1886) 63 Wis. 45.

³ Booth v. Robinson, (1886) 55 Md. 419.

⁴ Leo v. Union Pacific Ry. Co., 17 Fed. Rep. 273.

⁵ Merchants' Bank v. Pomeroy Flour Co., 41 Ohio St. 552.

⁶ Under the Civil Code of California, declaring that the powers of a corporation must be exercised, and its property controlled, by its board of directors, and providing that the decision of a majority of the directors, "made when duly assembled," is valid as a corporate act, a mort-

gage executed by the president and secretary, without a resolution of the board of directors, is void, though ratified by the holders of two-thirds of the stock. Action by the board is not dispensed with, in the case of a mining corporation, by the act providing that it is unlawful for the directors of such corporation to sell, mortgage, etc., unless the act be ratified by the holders of at least two-thirds of the stock. Alta Silver Min. Co. v. Alta Placer Min. Co., (1889) 78 Cal. 629; Cal. Civil Code, §§ 305, 308. In this case the levy of an assessment by the directors, to pay a debt secured by the invalid mortgage, did not render the mortgage valid.

⁷ Warfield v. Marshall & Co., (1887) 66 Iowa, 72.

mortgage loan did not increase the indebtedness of the company, it was not within the purview of the constitution of Pennsylvania which declares that the stock and indebtedness of corporations shall not be increased without the consent of the majority of the stockholders.¹ A mortgage made and recorded before a proposition to a contractor is accepted, and before any work is done, does not come within the prohibition of an act providing that improvement companies shall not make an assignment, conveyance, mortgage, or other transfer of their estate, while debts or liabilities to contractors remain unpaid, without their written consent.² And under such a provision, a written assent by the corporators that the real and personal property of the company "may be mortgaged" is broad enough to warrant the cancellation of a mortgage on some of its chattels, and the substitution of another mortgage on other chattels of the company.³ But a provision in articles of incorporation that "no instrument affecting the title to real estate shall be binding, unless ordered at a meeting of the official board," does not apply to a release of a mortgage.⁴ As to the formalities of execution, it is held that a mortgage executed in behalf of a corporation is not vitiated, as between the parties, because, in the certificate of acknowledgment, the treasurer acknowledged the instrument to be his own free act and deed.⁵ So a mortgage by a corporation by its attorney in fact is sufficient, if executed in the name of the corporation, under the attorney's own hand and seal; and it is no objection that the seal of the corporation was not affixed thereto, when it appears that the power of attorney was under seal.⁶ In an action for the conversion of personal property to which the plaintiffs claim title under a mortgage from a corporation, the introduction of the mortgage upon which the signature and seal appear to be regular and proper is sufficient to allow the jury to find that the mortgage is valid, that the corporation is duly established, and that the

¹ Appeal of Powell, (Pa. 1890) 19 Atlan. Rep. 559; Pa. Const. art. xvi, § 7.

² Appeal of Reed, (Pa. 1889) 130 Pa. St. 333; Pa. Act 1843, Jan. 21.

³ Star Printing Co. v. Andrews, (1890) 9 N. Y. Supl. 731.

⁴ Stevenson v. Polk, (1887) 71 Iowa, 278.

⁵ Fitch v. Lewiston Steam-Mill Co., (1888) 80 Me. 34.

⁶ First Nat. Bank v. Salem Capital Flour-Mills Co., (1889) 39 Fed. Rep. 89.

person signing the name of the corporation had authority so to do; and these facts are sufficient *prima facie* to establish the claim of the plaintiffs as to title, unless attacked.¹ Mortgages which have been executed, the money borrowed having been received and expended, are not affected by the invalid purpose for which they were made.²

§ 389. Right to mortgage franchises denied.—A corporation created for a public purpose, such as constructing, owning and managing a railroad for the accommodation and benefit of the public, can not, without distinct legislative authority, make any alienation, absolute or conditional, either of the general franchise to be a corporation or of the subordinate franchise to manage and carry on its corporate business, without which its franchise to be a corporation can have little more than a nominal value.³ And authority to a railroad company to

¹ *Hamilton v. McLaughlin*, (1887) 145 Mass. 20.

² *Wright v. Hughes*, (1889), 119 Ind. 324. Where a turnpike company issued bonds, secured by a mortgage on its road, for money borrowed to extend and complete its road, stockholders who have acquiesced therein until the money was expended can not be heard to complain for the first time, upon suit to foreclose the mortgage, that the bonds were unauthorized and *ultra vires*. *Browning v. Mullins*, (Ky. 1890) 13 S. W. Rep. 427.

³ *Richardson v. Sibley*, (1865) 11 Allen, 66, citing *Shrewsbury &c. R. Co. v. London &c. R. Co.*, 6 H. L. Cas. 136; *York &c. R. Co. v. Winans*, 17 How. 39; *Pierce v. Emery*, 32 N. H. 504; *Hall v. Sullivan R. Co.*, 21 Law Reporter, 140; *Worcester v. Western R. Co.*, 4 Metc. 566; *Commonwealth v. Smith*, (1865) 10 Allen, 455. In the last case cited the court said: "But in the case of a railroad company created for the express and sole purpose of constructing, owning and managing a railroad; authorized

to take land for this public purpose under the right of eminent domain; whose powers are to be exercised by officers expressly designated by statute; having public duties, the discharge of which is the leading object of its creation; required to make returns to the legislature; there are certainly great, and, in our opinion, insuperable objections to the doctrine that its franchise can be alienated, and its powers and privileges conferred by its own act upon another person or body without authority other than that decreed from the fact of its own incorporation. The franchise to be a corporation clearly can not be transferred by any corporate body, of its own will. Such a franchise is not in its own nature transmissible. The power to mortgage can only be coextensive with the power to alienate absolutely, because every mortgage may become an absolute conveyance by foreclosure, and although the franchise to exist as a corporation is distinguishable from the franchises to be enjoyed and used by the corporation,

mortgage its road, income and other property, does not authorize a mortgage of its franchises.¹ So in the case of a gold mining company, it has been held that, as a corporation could not mortgage its franchises, a mortgage purporting to do so was so far inoperative.²

§ 390. Power to make notes.—Corporations created for business purposes, unless restrained by charter or by statute, have, as a necessary incident, the power of incurring debts in the course of their legitimate business, and of making negotiable paper in payment of such debts.³ And of course, authority in a company's charter to "borrow money and issue its bonds therefor" imports power to make negotiable or non-negotiable paper, and give such securities as may be deemed most advantageous.⁴ So likewise an acceptance of a bill by a corporation binds it, although the bill was drawn on an officer of the corporation.⁵ An acceptance of an order by the New England Car Trust, to pay money already provided for by a contract with the company, does not come within the article of the articles of association of the car trust, providing that, in order to bind the company, all contracts involving liabilities for the payment of money shall be in writing, and signed by at least three members of the board of managers.⁶ The form of cor-

after its creation, yet the transfer of the latter differs essentially from mere alienation of ordinary corporate property. The right of a railroad company to continue in being depends upon the performance of its public duties. Having once established its road, if that and its franchise of managing, using and taking tolls or fares upon the same are alienated, its whole power to perform its most important functions is at an end. A manufacturing company may sell its mill, and buy another; but a railroad company can not make a new railroad at its pleasure." *Stewart's Appeal*, (1867) 56 Pa. St. 413; *Atkinson v. Marietta &c. R. Co.*, (1864) 15 Ohio St. 21; *Coe v. Columbus &c. R. Co.*, (1859) 10 Ohio St.

372. The case of *Kenebec &c. R. Co. v. Portland &c. R. Co.*, (1871) 59 Me. 9, is directly to the contrary.

¹ *Bullan v. Cincinnati &c. R. Co.*, 4 Biss. 35. But a general law may authorize the purchasers of the property of a railroad to acquire its franchise also by deed. *State v. Sherman*, (1872) 22 Ohio St. 411.

² *Carpenter v. Black Hawk &c. Co.*, (1875) 65 N. Y. 50.

³ *Fifth Ward Sav. Bank v. First Nat. Bank*, (1887) 48 N. J. 513.

⁴ *Talladega Ins. Co. v. Peacock*, 67 Ala. 253.

⁵ *Louisville, Evansville &c. Ry. Co. v. Caldwell*, 98 Ind. 245.

⁶ *French Spiral Spring Co. v. New England Car Trust*, (1887) 32 Fed. Rep. 44.

porate notes is governed by strict rules more fully set forth in works on commercial paper. In a recent case in Massachusetts, a promissory note, containing the words "we promise to pay," signed, "JOHN ROACH, Treasurer," and stamped with a circular corporate seal, the circumference of which passes through the words "ROACH" and "Treasurer," containing the name of the corporation printed in a circle near its outer edge, and the words, "Incorporated, 1884," in the center, the seal being in the usual place of signature, and the name being to the left, and below its center, was held to be the note of the corporation.¹ A seal pasted on a corporation's note does not render it non-negotiable, unless authorized by the vote of the corporation and placed thereon by the proper officer, the note purporting to be under seal.² Where a note was signed by one who, the evidence tended to show, was defendant's secretary, and was impressed with a stamp which appeared to have been used as the seal of the company, and there was evidence that plaintiff had advanced to defendant the amount for which the note was given, a finding that defendant had executed the note in consideration of money lent to it was not disturbed.³ If a religious corporation can give a note, it can do so only by authority of those in whom the management of its affairs is vested, *acting as a board*. A majority of them signing separately do not bind the corporation.⁴ If, however, a corporation has power to make a note for any purpose, it can not, as against a *bona fide* holder, set up that it had no power to make the particular note in question.⁵ Therefore, when a corporation has power, under any circumstances, to issue negotiable paper, a *bona fide* holder has a right to presume that it was issued under circumstances which gave the requisite authority, and such paper is no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper.⁶ A private corporation, authorized to issue negotiable paper, is bound by

¹ Miller v. Roach, (1889) 150 Mass. 146.

² Mackay v. St. Mary's Church, (1885) 15 R. I. 121; 2 Am. St. Rep. 881.

³ Jansen v. Otto Stietz &c. Co., (1888) 1 N. Y. Supl. 605.

⁴ People's Bank v. St. Anthony's &c. Church, 39 Hun, 498.

⁵ Lehigh Valley Coal Co. v. West Depere Agricultural Works, 63 Wis. 45.

⁶ National Bank of Republic v. Young, (1887) 41 N. J. Eq. 531.

its note in the hands of an innocent holder for value, although in executing it the corporation exceeded the amount of indebtedness which it was authorized to incur.¹ Under the statute providing that the amount for which any one individual or firm shall be indebted to a national bank shall not exceed a certain sum, when such a bank violates the provision by lending to one person an amount in excess of the limit, such person can not set up the violation of the statute as a defense to his liability on the note. If a penalty is to be enforced against the bank, it can be done only at the instance of the government. A contract entered into by the bank in violation of this law is not void.² Where the law provides that the articles of incorporation shall be recorded, the courts will presume that this was done, and will not permit a surety on the note of a corporation to testify that he understood the company to be a partnership, and that the manager was liable as a member of it.³ Persons dealing in the commercial paper of a corporation are bound to take notice of the extent of its powers.⁴

§ 391. Power to make accommodation paper.—A corporation created for the purpose of carrying on a manufacturing business has implied power to make negotiable paper for use, within the scope of its business, but no power to become a party to bills or notes for the accommodation of others.⁵ So therefore a private manufacturing corporation has no power to accept drafts for the accommodation of its stockholders or others. The consent of the stockholders or directors can not confer such power; and a previous course of dealing of the corporation will not enable the holder of such a draft to recover on it, against the corporation, if he is not a holder for value, as well as in good faith, without notice that the acceptance was an accommodation acceptance.⁶ And generally no

¹ *Auerbach v. Le Sueur Mill Co.*, 28 Minn. 291; s. c. 41 Am. Rep. 285.

² *Wyman v. Citizens' Nat. Bank*, (1887) 29 Fed. Rep. 734; U. S. Rev. Stat. § 5200.

³ *Bank of Monroe v. Gifford*, (1887) 72 Iowa, 750.

⁴ *Credit Co. Limited v. Howe Machine Co.*, (1887) 54 Conn. 357; s. c. 1 Am. St. Rep. 123.

⁵ *National Bank of Republic v. Young*, (1887) 41 N. J. Eq. 531.

⁶ *Webster v. Howe Machine Co.*, (1887) 54 Conn. 394.

corporation can, in the absence of any general or special law conferring such power, bind itself by indorsing promissory notes for accommodation of the maker, for a consideration paid.¹ Accordingly an insurance company has no power to indorse accommodation paper for a third party.² So likewise the officers of a transfer company, whose articles of incorporation empower it "to engage in the general freight and transfer business, and such other business as may not be inconsistent therewith," have no power to sign its name to a contract of suretyship for the purpose of guarantying the credit of a third party, nor have they power subsequently to sign a letter purporting to assume the payment of the amount stipulated in such contract. Both instruments are illegal as to such corporation; and, being *ultra vires*, it can not be held liable upon them.³ A manager can not generally accept bills and bind his company.⁴ But where the treasurer of a corporation has for a number of years, with the knowledge and consent of his principal, signed and indorsed business paper in its name, the corporation is estopped to deny the treas-

¹ *National Park Bank v. German-American Mutual Warehousing & Security Co.*, (N. Y. 1889) 22 N. E. Rep. 567.

² In *assumpsit* by a bank against a life insurance company, on its indorsement of a note, it appeared that the company was chartered with no unusual powers; that the note, indorsed in its name by W., its president, was that of a railroad company of which he was also president, and to the credit of which the proceeds were put on his procuring the note discounted at the bank; that W. had, with the assent of the directors of the insurance company, been the manager of its finances, and had signed and indorsed its paper to a large amount as its president; but it did not appear that he had made any use of the company's name, with the knowledge of the directors, which they considered as binding thereon, except where it was under-

stood that the company received the proceeds or the direct benefit; and it was held, that the insurance company had no power to indorse an accommodation note for a third party; and even if it had, the facts gave W., as its president, no implied authority to sign its name for such purpose. *Ætna Bank v. Charter Oak Life Ins. Co.*, 50 Conn. 167.

³ *Lucas v. White Line Transf. Co.*, (1887) 70 Iowa, 541.

⁴ In *assumpsit* against a corporation, on acceptances by J., as manager of defendant, there was evidence that J. was an employee merely, without express authority to sign or accept paper; that he was a stockholder in the corporation which drew the acceptances sued on; that a memorandum of the maturity of the drafts was, under J.'s directions, entered on the books of defendant, but that the directors had no knowledge of the memorandum or ac-

urer's authority to indorse an accommodation note to a purchaser for value, who relied upon these transactions as evidence of his authority.¹ And in an action on an accommodation note indorsed to plaintiff by defendant's treasurer, evidence that at the time of the indorsement plaintiff was told that it was the defendant's regular indorsement is admissible to show plaintiff's knowledge of the agent's apparent authority to indorse.² And where also a note was executed by defendant's president in his own favor for the accommodation of the company, by him discounted, and the proceeds used for defendant's benefit, defendant having retained the benefit of the transaction, was estopped to deny, as against the administratrix of the president, who had paid the note, the authority of the president to execute it.³ Although from the form of a transaction it appeared that an individual was a principal debtor, and a corporation only a surety, yet, the fact being otherwise, and the corporation the principal debtor, it was held that the pledge or appropriation of its bonds upon the debt was not *ultra vires*, but within its powers.⁴ Finally, it is stated to be a general doctrine of the law, that where a corporation has power under any circumstances to issue negotiable paper, a *bona fide* holder has a right to presume that it is issued under circumstances which give the requisite authority, and the doctrine is applied to commercial paper made by a corporation for the accommodation of a third person when in the hands of a *bona fide* holder who has discounted it before maturity on the faith of its being business paper.⁵

ceptances; that J. drew notes at a bank to meet expenses of defendant; that the acceptances sued on were for the accommodation of the drawer. It was held, that defendant was not bound by such acceptances. *Merchants' Nat. Bank v. Detroit & Works*, (1888) 68 Mich. 620.

¹ *Second Nat. Bank v. Pottier & Co.*, (1888) 56 N. Y. Super. Ct. Rep. 216.

² *Second Nat. Bank v. Pottier & Co.*

Co., (1888) 56 N. Y. Super. Ct. Rep. 216.

³ *Tuscaloosa & Co. v. Perry*, (1888) 85 Ala. 158.

⁴ *Baxter v. Washburn*, 8 Lea, 1.

⁵ *National Bank v. Young*, 5 Cent. Rep. 113 (N. J.), citing *Bird v. Daggett*, 97 Mass. 494; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57; s. c. 3 Am. Rep. 322; *Mechanics' Bank Assoc. v. Whitehead Co.*, 35 N. Y. 505.

§ 392. Power to lend money.— A loan of money by a corporation is not *ultra vires*. And particularly it has been held not *ultra vires* for a trading corporation to lend money to one dealing with it, so as to enable the borrower to carry on the transactions.¹ And, moreover, any corporation, public or private, has capacity, if not prohibited, to take a mortgage as security for a debt contracted in furtherance of the objects of its creation.² But the private corporation chartered by the name of the "State Grange of the Patrons of Husbandry of Alabama" has no express grant of power to lend money, and no such power can be implied from the declared purposes and objects for which its charter was granted; on the contrary, such power is excluded by the declaration that the corporation is not created for pecuniary profit.³ Neither does a provision in the charter of a corporation giving it a lien upon a stockholder's shares to secure any indebtedness from him to it, authorize the corporation to lend to the stockholder.⁴ If a corporation has power "to hold, acquire and dispose of real and personal property for the uses and purposes of said corporation," it has power to acquire, by transfer, title to a note taken in the course of its business, and to sue upon the note.⁵ So, under a statute giving a corporation power to discount non-negotiable notes, and to take, hold, and convey any property, real, personal, or mixed, it was held, that it might take and hold city warrants.⁶ And a corporation may take a mortgage, although unable to take the oath required by statute.⁷ A corporation chartered to accumulate a fund to be lent on real estate security or divided among its members, can lend

¹ Holmes v. Willard, (1889) 53 Hun, 629. Judge Van Brunt here says: "We have not been referred to any authority or principle under which such a transaction can be held *ultra vires* of a corporation, particularly a trading corporation which has the right to exercise such mercantile powers as may be convenient and necessary for the successful transaction of its business, which clearly gives it the authority to extend mercantile facilities to the persons deal-

ing with it, if in its judgment it thinks it for the benefit of its business so to do."

² State v. Rice, (1880) 65 Ala. 83.

³ Chambers v. Falkner, 65 Ala. 448.

⁴ Webster v. Howe Machine Co., (1887) 54 Conn. 394.

⁵ Wayland University v. Boorman, 58 Wis. 657.

⁶ Aull Savings Bank v. Lexington, 74 Mo. 104.

⁷ Lincoln Savings Bank v. Ewing, (1883) 12 Lea, 598.

money to its members and take deeds of trust on realty as security, and sell and assign such contracts of loans.¹ And generally a mortgage to a life insurance company securing a note given in consideration of a loan of the company's funds is valid.² A party who has given a mortgage to a corporation from which he has received a loan is estopped to deny, in a suit to foreclose, that it had authority to make the loan.³ So where the charter of a company provides that its surplus funds shall be invested in mortgages on real estate in New York, or in certain classes of bonds, it is not competent for one who in another State has obtained a loan on personal security, or his surety, to set up in defense the want of power in the company to make the loan.⁴ And even where a trust company, under its charter, had authority to invest only in such securities as were authorized thereby, it was held that it might enforce payment of an unauthorized loan.⁵ Where, however, a director, while indebted to his bank for an amount greater than seventy-five per cent. of the stock held by him, obtained a loan for a further amount, giving his note therefor, guaranteed by another person, the charter of the bank prohibiting its lending to a director more than seventy-five per cent. of the amount of his stock, it was held that the note was void, and could be enforced neither against the director nor the guarantor.⁶ But a corporation by its charter prohibited from lending money at a rate of interest exceeding the legal rate, may lend money in another State at a rate of interest which, although legal there, is higher than the legal rate in the State of its incorporation.⁷

¹ *Detweiler v. Breckenkamp*, 83 Mo. 45.

² *Washington Bank v. Continental Life Ins. Co.*, 41 Ohio St. 1. Though the life insurance company's charter provided that its "capital stock and funds shall be invested either in loans upon bonds and mortgages upon real estate . . . or in loans upon . . . United States stocks and bonds."

³ *Pancoast v. Travelers' Ins. Co.*, 79 Ind. 172.

⁴ *New York Mut. Life Ins. Co. v. Wilcox*, 8 Biss. C. Ct. 203.

⁵ *Davis Sewing Machine Co. v. Best*, 30 Hun, (N. Y.) 638.

⁶ *Workingmen's Banking Co. v. Rautenberg*, 103 Ill. 460; s. c. 42 Am. Rep. 26; *Dickey and Craig, JJ.*, dissenting.

⁷ *United States Mortgage Co. v. Sperry*, 24 Fed. Rep. 838. Cf. *Reiff v. Bakken*, 36 Minn. 333, and *Gamble v. Central R. & B. Co. of Georgia*, (1888) 80 Ga. 595; s. c. 12 Am. St. Rep. 276, 280, as to foreign usury laws.

§ 393. Power to hold the stock of other companies.—As a general rule a private corporation can not subscribe to the stock of another corporation the business of which is entirely different from its own.¹ A purchase by a corporation of stock in another corporation is not, however, necessarily void.² There is a presumption that the purchase of the stock of another company was necessary to the purposes of the corporation purchasing.³ And there is no presumption that a corporation is incapable of purchasing and holding shares of the stock of another corporation, it not appearing under what circumstances it was acquired or held.⁴ A corporation may invest in the stock of other corporations, as well as in any other funds, provided it be done *bona fide*, and with no sinister or unlawful purpose, and there be nothing in its charter, or in the nature of its business, that forbids it.⁵ But, though a railroad corporation may take the stock of another railroad corporation by way of security for a debt, it has no right to invest its corporate funds in the purchase of such stock. Such an investment is *ultra vires*.⁶ Where one corporation makes advances to another, taking as collateral mortgage bonds of the latter, which it is unable to redeem, defaulting in the pay-

¹ Talmage v. Pell, 7 N. Y. 328; Franklin Co. v. Lewiston Bank, 68 Me. 43; Mechanics' Bank v. Meridian Agency, 24 Conn. 159; Beach on Railways, § 80. In Pennsylvania corporations are forbidden by statute to use their funds in the purchase of any stock in other corporations, or to hold the same, except as collateral security for a prior indebtedness. 1 Brightley's Pa. Digest, 343, § 30. And similar statutes are to be found in other States. Tenn. Code, (1884) § 2496; Ind. Rev. Stat., (1881) § 3858; Colo. Gen. Stat., (1883) p. 183, § 10, and p. 189, § 35.

² Hill v. Nisbet, (1884) 100 Ind. 341. Whether the purchase of stock in one corporation by another is *ultra vires* or not, must depend upon the purpose for which the purchase was made, and whether such purchase

was, under all the circumstances, a necessary or reasonable means of carrying out the object for which the corporation was created, or one which under the statute it might accomplish. It must be said at once, that where the purchase of stock in one corporation by another amounts to an engaging in a business other than that authorized by its charter, such purchase is *ultra vires*; and this is so, not because the purchase is stock, but, because the business is outside the scope of its charter."

³ Ryan v. Leavenworth, 21 Kan. 365.

⁴ Evans v. Bailey, (1884) 66 Cal. 112.

⁵ Booth v. Robinson, 55 Md. 419.

⁶ Milbank v. New York, Lake Erie &c. R. Co. 64 How. Pr. 20.

ment of the interest, and thereafter such corporation makes further advances secured by bonds and stock of the latter corporation, the transaction is not within the prohibition of the code of West Virginia forbidding one corporation to subscribe for or purchase stock, bonds, or securities of another corporation except in payment of a *bona fide* debt.¹ In this case it was held that a railway company may lawfully make advances of money or supplies to another railway corporation to enable it to complete its line when the latter is to operate as a natural feeder to the former, taking the bonds or stock of the latter as collateral security. In New York it is enacted that any railroad company, created under and by the laws of that State or of any adjoining State, may subscribe for, take and hold the stock of union depot companies created under that act, in such amounts as the directors of the subscribing company may, from time to time, deem best for its interests.² It has even been held that the issue of stock for the purchase of other telegraph companies is lawful.³

§ 394. The same subject continued.—But the greater weight of authority is that a corporation can not, unless authorized by statute, subscribe to or hold the capital stock of another.⁴ Thus a railway company can not subscribe for stock in another railway, without obtaining express legislative authority.⁵ A railway corporation is not authorized in the general railroad law of Michigan to acquire the stock and fran-

¹ Taylor County v. Baltimore &c. R. Co., (1888) 35 Fed. Rep. 161.

² N. Y. Laws of 1882, ch. 273, § 21.

³ Williams v. Western Union Telegraph Co., 48 N. Y. Super. Ct. Rep. 349. Arnoux, J., dissenting.

⁴ Valley Ry. Co. v. Lake Erie Iron Co., (1888) 46 Ohio St. 44. In the case first cited in the last section this was admitted in terms, the court saying, "the proposition is broadly stated in many cases, that one corporation can not, without express statutory authority, become the owner of any portion of the stock of another corporation," and cites:

Pearce v. Madison &c. R. Co., 21 How. 441; Mutual &c. Assoc. v. Meridian &c. Co., 24 Conn. 159; Franklin Co. v. Lewiston Sav. Bk., 68 Me. 43; Central R. Co. v. Collins, 40 Ga. 582; Sumner v. Marcy, 3 Wood. & M. 105. The principal case cites besides, Central R. Co. v. Pennsylvania R. Co., 31 N. J. Eq. 475.

⁵ Central R. Co. v. Collins, 40 Ga. 582; Hazelhurst v. Savannah &c. R. Co., 43 Ga. 13, 57; Central R. Co. v. Pennsylvania R. Co., 31 N. J. Eq. 475, 494; Elkins v. Camden &c. R. Co., 36 N. J. Eq. 5; Beach on Railways, § 81; Salomons v. Laing, 12

chises of another completed company, with the intention of itself exercising those franchises; and, in the absence of statutory authority, the power does not exist at common law.¹ Thus a corporation having the right to mine, in organizing another corporation for mining purposes, or in dealing in the stock of such corporation, acts beyond the scope of its powers.² A company filing its certificate under the same law under which gas companies operate, stating its objects to be to make and supply gas and to purchase and hold the stock of other gas companies, has no power thereunder to so hold such stock, the object being to control such companies and stifle competition throughout a large city.³ So a corporation formed for the purpose of furnishing a city with electric light, and claiming the exclusive privilege thereof, after its stock has been purchased by the president of the gas and water company of the city for the purpose of destroying competition, is not entitled to the aid of a court of equity in restraining a rival company from infringing its exclusive privilege.⁴ And a

Beav. 339; *Maunsell v. Midland & C. Ry. Co.*, 1 Hem. & M. 130; *Great Northern Ry. Co. v. Eastern Counties Ry. Co.*, 21 L. J. Ch. 837. Cf. 8 Vic. ch. 16, § 65; *Angell & Ames*, § 392; *Green's Brice's Ultra Vires & C.* (2nd ed.) 91. The General Railroad Act of New York declares with respect to companies formed thereunder that it shall be unlawful for such companies to use any of their funds in the purchase of any stock in their own or in any other corporation. N. Y. Laws of 1850, ch. 140, § 8. But a railroad that has leased another may exchange its stock for the stock of the lessor road. N. Y. Laws of 1867, ch. 254, as amended by Laws of 1879, ch. 503. Generally, however, such an authority is not to be implied by a grant of power to lease other roads. *Salomons v. Laing*, 12 Beav. 339, 353. In several States, however, there are statutes authorizing railways to sub-

scribe under certain restrictions to the stock of other railway companies. Ohio Act of March 3rd, 1851, § 4; *White v. Syracuse & C. R. Co.*, 14 Barb. 559; Md. Laws of 1836, ch. 276, granting the privilege to the Baltimore & Ohio R. Co.; *Mayor v. Baltimore & C. R. Co.*, 21 Md. 50; *Beach on Railways*, § 81. In Kansas a railway company may purchase shares of stock in a connecting line for the purpose of consolidation. *Ryan v. Leavenworth & C. Ry. Co.*, 21 Kan. 365.

¹ *McIntosh v. Flint & C. R. Co.*, 34 Fed. Rep. 582.

² *McMillan v. Carson Hill Union Mining Co.*, 12 Phila. (Pa.) 404.

³ *People v. Chicago Gas Trust Co.*, (1889) 130 Ill. 268; s. c. 7 Ry. & Corp. L. J. 23.

⁴ *Appeal of Scranton Electric Light & Heat Co.*, (1888) 122 Pa. St. 154; s. c. 9 Am. St. Rep. 79. Such corporation wilfully frustrates the object of its institution and commits a fraud on the public, and is not entitled to an equitable consideration.

railroad corporation has no power to guaranty dividends to the subscribers for stock in an elevator corporation.¹ An insolvent construction company contracted to build a railway for a corporation, and received nearly all of the latter's stocks, bonds, and assets as security for its outlay. Without beginning the work, the persons in control of the construction company transferred all the stock to the persons managing another railway already in operation, among whom were the president and many of its directors. The funds of the latter corporation were used in purchasing the stock of the construction company, and in this manner the said stock, and the stock and assets of the projected road, were controlled by the same management as the road then in operation. The latter began at the same point, and ran for nearly the same distance, and in the same general direction, as the projected line, which would be, when completed, a competing line. It was held that the evident purpose and effect of the transaction was to violate by indirection the constitution, rendering the purchase of the stock of one corporation by another, and any contract between them tending to lessen competition in their respective businesses or to encourage monopoly, illegal and void.² And equity will enjoin the carrying out of such an agreement, and will seize the assets of the insolvent construction company at the instance of persons who have lent money to its president and sole manager to use in building the road, on the faith of his pledge of a share of the profits derived from the work, the company occupying as to them the relationship of derelict trustees.³ While stock purchased without authority is held, dividends may be collected, but the company holding the stock has no right to vote upon it. An attempt so to vote will be enjoined at the instance of stockholders of the company whose stock is so held.⁴ But although a company's charter prohibits its purchasing stock in other

¹ Elevator Co. v. Memphis & Charleston R. Co., (1887) 85 Tenn. 703; 4 Am. St. Rep. 798. Yet in this case the charter conferred such additional powers as might be convenient for the due and successful execution of the powers granted.

² Langdon v. Branch, 37 Fed. Rep. 449; Const. Ga. art. 4, § 2, par. 4.

³ Langdon v. Branch, 37 Fed. Rep. 449.

⁴ Milbank v. New York, Lake Erie & C. R. Co., 64 How. Pr. 20.

companies, it can not, after the stock has been delivered and as against an innocent holder for value, defend a suit on a note by showing it to have been given for the purchase of stock of another corporation.¹

§ 395. Power to buy its own shares.—The doctrine that corporations, when not prohibited by their charters, may buy and sell their own stocks, is supported by a respectable line of authorities.² And the rule appears to be well settled in the United States that a corporation may, unless prohibited by statute, purchase its own stock, or take it in pledge or mortgage; that it may purchase its own stock in exchange for money or other property, and hold, reissue or retire the same, provided such act is done in entire good faith, is an exchange of equal value, and is free from all fraud, actual or constructive;³ provided that the corporation is neither insolvent nor in process of dissolution, and that the rights of creditors are not injuriously affected.⁴ In the absence of legislative provision to the contrary, a corporation may hold and sell its own stock, and may receive it in pledge or in payment in the lawful exercise of its corporate powers.⁵ And a very late authority holds also that a corporation, if not prohibited by its charter, which gives it general contractual powers, may receive its own capital stock from a stockholder and pay him therefor with the bonds of another corporation, with which he had originally purchased the stock.⁶ But an Ohio court declares

¹ *Wright v. Pipe Line Co.*, 101 Pa. St. 204; s. c. 47 Am. Rep. 701.

² *Dupee v. Boston &c. Co.*, 114 Mass. 37; *Chicago &c. R. Co. v. Marseilles*, 84 Ill. 145; s. c. 84 Ill. 643; *Hartridge v. Rockwell*, R. M. Charlton, 260; *Robinson v. Beal*, 26 Ga. 28; *Leland v. Hayden*, 102 Mass. 551; *American &c. Co. v. Haven*, 101 Mass. 308; *Bank v. Bruce*, 17 N. Y. 507; *Jones v. King*, 86 Ill. 20; *Iowa &c. Co. v. Foster*, 49 Iowa, 25; *Taylor v. Miami Ex. Co.*, 6 Ohio, 176; *State v. Building Assoc.* 35 Ohio St. 253; *Bank v. Champlain &c. Co.*, 18 Vt. 131; *Pierce on Railroads*, 505. But see *Holladay v. Elliott*, 8 Ore-

gon, 84; *Preston v. Grand Colliery &c. Co.*, 11 Sim. 327.

³ *First Nat. Bank v. Salem &c. Co.*, (1889) 39 Fed. Rep. 89, Deady J., citing *Bank v. Bruce*, 17 N. Y. 510; *Taylor v. Exporting Co.*, 6 Ohio, 176; *In re Insurance Co.*, 3 Biss. 452; *Bank v. Transportation Co.*, 18 Vt. 138; *Clapp v. Peterson*, 104 Ill. 26; *Dupee v. Water Power Co.*, 114 Mass. 37.

⁴ *Clapp v. Peterson*, 114 Ill. 26.

⁵ *Dupee v. Water Power Co.*, 114 Mass. 37.

⁶ *Rollins v. Shaver Wagon & Carriage Co.*, (Iowa, 1890) 45 N. W. Rep. 1037.

that the decided weight of authority is against the existence of the power unless conferred by express grant or clear implication.¹ So therefore an agreement between a manufacturing corporation and a stockholder, to purchase its stock from the stockholder, was held void.² The foundation principle, says the Ohio court, upon which these latter cases rest, is that a corporation possesses no powers except such as are conferred upon it by its charter, either by express grant or necessary implication. It is true, however, that in most jurisdictions, where the right of a corporation to traffic in its own stock has been denied, an exception to the rule has been admitted to exist, whereby a corporation has been allowed to take its own stock in satisfaction of a debt due it. This exception is supposed to rest on a necessity which arises in order to avoid loss. It was early recognized in Ohio,³ and has been incidentally referred to as an existing right since.⁴ But however that may be, the right of a corporation to traffic in its own stock appears to be inconsistent with the principle of the liability of stockholders to creditors.⁵ Now it is just as plain that a business or trading corporation can not exist without stock and stockholders as it is that the creditors of such corporation are entitled to the security from the liability of stockholders named in the constitution.⁶ The corporation itself can not be a stockholder of its own stock within the meaning of this provision of the constitution. Nobody will deny this proposition. And if a corporation can buy one share of its stock at pleasure,

¹ *Coppin v. Greenlees &c. Co.*, (1882) 38 Ohio St. 275.

² *Coppin v. Greenlees &c. Co.*, (1882) 38 Ohio St. 275; s. c. 43 Am. Rep. 425; *Bartholomew v. Bently*, 1 Ohio St. 42; *Strauss v. Insurance Co.*, 5 Ohio St. 59; *Bank v. Insurance Co.*, 12 Ohio St. 601; *Hays v. Galion*, 29 Ohio St. 338; *Currier v. Lebanon &c. Co.*, 56 N. H. 262; *Savings Bank v. Melfkuhler*, 19 Kan. 60.

³ *Taylor v. Miami Exporting Co.*, 6 Ohio, 176; *Coppin v. Greenlees &c. Co.*, (1882) 38 Ohio St. 278.

⁴ *State v. Building Assoc.*, 35 Ohio St. 258.

⁵ *Coppin v. Greenlees &c. Co.*, (1882) 38 Ohio St. 278; Ohio Const. art.

xiii, § 3, which reads as follows: "Dues from corporations shall be secured by such individual liability of stockholders, and other means, as may be prescribed by law; but in all cases, each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock."

⁶ *Coppin v. Greenlees &c. Co.*, (1882) 38 Ohio St. 278; *State v. Sherman*, 22 Ohio St. 411.

why may it not buy every share? If the right of a corporation to purchase its own stock at pleasure exists and is unlimited, where is the provision intended for the benefit of creditors? This is not the security to which the constitution invites the creditors of corporations." I am aware, that the amount of stock required to be issued is not fixed by the constitution or by statute, and also that provision is made by statute for the reduction of the capital stock of corporations; but of these matters creditors are bound to take notice.¹ They have a right, however, to assume that stock once issued, and not called back in the manner provided by law, remains outstanding in the hands of stockholders liable to respond to creditors to the extent of the individual liability prescribed. In this view it matters not whether the stock purchased by the corporation that issued it, becomes extinct, or is held subject to be reissued. It is enough to know that the corporation, as purchaser of its own stock, does not afford to creditors the security intended. And surely, if the law forbids the organization of a corporation without stock because the required security is not furnished, it can not be, that having brought the corporation into existence it invests it with power to assume at pleasure the identical character or relation to the public, that was an insurmountable objection to the giving of corporate existence in the first place."²

§ 396. The power of eminent domain.—Corporations may take private property under the power of eminent domain only when the use they wish to make of it is a public use. The fact that the property taken is bestowed on a private person or corporation and that private emolument results from the use does not prevent the exercise of the power if the use is public, and if the public benefit is the object had in view in authorizing the taking.³ So far as the State is concerned the private emolument of the person or corporation

¹ *Coppin v. Greenlees &c. Co.*, *v. Williams*, 2 Mich. 427; *Harris v. (1882) 38 Ohio St. 278.*

² *Coppin v. Greenlees &c. Co.*, *Townsend*, 39 N. Y. 171; *Concord R. Co. v. Greely*, 17 N. H. 47; *(1882) 38 Ohio St. 278.*

³ *Mills on Em. Dom.* § 13; *Ander- Whiteman v. Wilmington &c. R. Co.*, *son v. Turbeville*, 6 Cold. 150; *Swan 2 Harr. 514; Stockton &c. R. Co. v.*

conducting the enterprise is to be regarded merely as compensation for the benefit conferred on the public.¹ Although a railway company is in a certain sense a private corporation, yet the purpose for which it is created is a public one, as much so as if the road were constructed by the State. Upon this ground, and upon this alone, can the exercise of the power of eminent domain in favor of such corporations be supported.² The true criterion by which to judge of the character of the use is whether the public may enjoy it by right, or only by permission, and not to whom the tax or toll for supporting it is paid.³ In determining whether a particular use is public or not, it is an immaterial consideration that the control of the property is vested in private persons, who are actuated solely by motives of private gain. The inquiry must necessarily be, what are the objects to be accomplished, not who are the instruments for attaining them. The public use required need not be the use or benefit of the whole public or State, or any large portion of it. It may be for the inhabitants of a small or restricted locality, but the use and benefit must be in common, not to particular individuals or estates.⁴ Or as otherwise expressed, the question is whether it is of so much benefit or advantage to the community, either directly or indirectly, that it can not be said to be wholly private in its effect and operation.⁵ A railroad company incorporated under a statute making it a common carrier is not rendered a private enterprise, so as to deprive it of the right of eminent domain, by the fact that it is poorly constructed, and terminates at a coal mine belonging to the corporation, when it appears that it carries the mails, passengers and freight, runs regular trains, and has expended about a quarter of a million dollars in building its road, and acquiring its right of way.⁶

City of Stockton, 41 Cal. 147; *Bona-*
parte v. Camden &c. R. Co., Bald.
 223; *Willson v. Blackbird &c. Co.*, 2
 Pet. 245.

¹ *Concord &c. R. Co. v. Greely*, 17
 N. H. 47.

² *Cf.* Mills on Eminent Domain,
 § 14; *Pine Grove v. Talcott*, 19 Wall.
 666; *Secombe v. Milwaukee R.* 23
 Wall. 108; *Weir v. St. Paul R. Co.*,

18 Minn. 155; *Brown v. Beatty*, 34
 Miss. 227; *Swan v. Williams*, 2 Mich.
 427; *Stewart v. Polk County*, 30
 Iowa, 9.

³ Mills, Em. Dom. § 14.

⁴ Lewis, Em. Dom. §§ 160, 161.

⁵ Wood, Ry. Law, § 226.

⁶ *Colorado Eastern Ry. Co. v. Union*
Pac. Ry. Co., (1890) 7 Ry. & Corp.
 L. J. 373. In this case the court

Certainly it is within both the letter and the spirit of the law applicable to public railroad corporations, where such an object, as above indicated, is coupled with the obligation, inseparably affixed by the statute to the franchise itself, to become also a common carrier of passengers and freight, and the corporation actually performs such duty to the public, especially where the evidence shows that for the greater period and in the latter years, of the existence and operation of the road, its

says: "It does seem to me that the right of eminent domain should not necessarily be denied to a railroad corporation because of the fact that the primary and chief inducement moving its promoters was to develop private coal mines and bring their products to market." And continues: In *Railroad Co. v. Moss*, 23 Cal. 324, the court say: "It is urged that the plaintiffs are constructing a railroad from a coal mine in the mountains, through a desolate region, to navigable waters, to enable it to get coal ready to market, and that this is a mere private use, and that therefore they have no right to appropriate the property of others to its purposes without their consent.

. . . The plaintiffs, in common with other railroad companies organized under this act, are bound by these provisions which make it obligatory upon them to act as common carriers. . . . The fact that their road does not connect points of present commercial importance can not affect the rights of the plaintiffs. Railroads often make commercial points by their construction, and a large and cheap supply of coal . . . is one of the great necessities of the State, and a matter in which the whole State is interested." In the progress of civilization, municipal existence, as well as the maintenance of rural populations without timber supply, may be so dependent upon

a large supply of coal for fuel as to render railroads for its transportation alone of imperative public necessity. It would in fact be difficult to conceive of an object of greater public use. It is as much so as the freightage of breadstuffs, meats, and other necessary supplies for human sustenance in our large cities, or compact communities, dependent upon exterior sources for their production. It would be no answer to their claim to be public corporations to say, for instance, that a community like Denver was not wholly dependent upon this road for its supply of fuel, as there are other railroads which may bring such supply. Competition is not only the life of trade (or at least is yet supposed to be by the common people); but the multiplication of products, and the facilities for getting them to market, tend to cheapen the necessities of life to the masses; and in the most beneficent and legitimate sense they should retain their character as public necessities. Government itself is maintained to promote the general welfare, and the right of eminent domain has its root in this soil. What is said by Depue, J., in *De Camp v. Railroad Co.*, 47 N. J. Law, 44, respecting a like proceeding where a railroad began in a mine, is quite pertinent; "This enterprise does not lose the character of a public use because of the fact that the projected railroad

business has been confined principally to the carrying of passengers and general freight, however small it may have been.¹ It has been aptly said that if the right to exercise the power of eminent domain should have been denied in the early history of railroads in this country because of their small beginning, some of the greatest railroad enterprises which have developed and strengthened the commerce and wealth of the country, would have perished in their infancy.²

§ 397. **The same subject continued.**—The question of public use is not affected by the lease of a road. Accordingly a railroad company is not precluded from acquiring lands by proceedings *in invitum* by the mere fact of its having leased its road for the entire term of its corporate existence.³ And the mere act of leasing its tracks does not forfeit the right of a railway company to condemn land under the law of eminent

is not a thoroughfare, and that its use may be limited by circumstances to a comparatively small part of the public. Every one of the public having occasion to send materials, implements, or machinery for mining purposes into, or to obtain ores from, the several mining tracts adjacent to the location of this road, may use this railroad for that purpose, and of right may require the company to serve him in that respect; and that is the test which determines whether the use is public. Nor will any motive of personal gain which may have influenced the projectors in undertaking the work take from it its public character. . . . A particular improvement, palpably for private advantage only, will not become a public use because of the theoretical right of the public to use it. But where the franchise is in its nature a public franchise, as the transportation of freight is, and the object promoted is one that concerns the public interests, as the develop-

ment of the mining resources of a State does, the improvement is essentially a public benefit and advantage; and if there be no restriction on the right of the public to use it, and no inability to use it, except such as arises from the circumstances, the court, in determining whether the improvement is such a public use as that the right of condemnation shall extend to it, will not scan closely the number of individuals immediately profited by it. Indeed, it would not be possible to indicate the number of persons, or define the area of the limits, to which the benefit of such an improvement may extend."

¹ Colorado Eastern Ry. Co. v. Union Pac. Ry. Co., (1890) 7 Ry. & Corp. L. J. 373.

² Colorado Eastern Ry. Co. v. Union Pac. Ry. Co., (1890) 7 Ry. & Corp. L. J. 373.

³ *In re* New York & c. Ry. Co., 35 Hun, 220; s. c. 99 N. Y. 12.

domain.¹ Statutes authorizing an exercise of the right of eminent domain are to be strictly construed.² But where the provisions of a statute, relative to several roads changing their locations in order to meet in a union depot, can only be effectuated by one of the companies taking land, the authority to do so must be regarded as conferred by the statute.³ Although the power of eminent domain may not have been expressly delegated to a corporation, yet if the enterprise which it is organized to conduct appears, from its charter and the circumstances of the case, to be of a public nature, the power is deemed to have been granted by implication, and *quo warranto* proceedings will not lie against it for the exercise thereof.⁴ Thus where a railway company is organized under a valid charter, and is shown to have done corporate acts under it, this is sufficient to establish a *prima facie* right to take property by eminent domain, and this *prima facie* right can not be successfully assailed in a mere collateral proceeding.⁵ Proof that the petitioner is a corporation *de facto* is all the law requires in this class of cases. Evidence, although it may be slight, of corporate acts done by petitioner, is accepted as sufficient. Thus where it appears that an engineer has been appointed, the line of the proposed road has been located, and other steps taken towards the building of the road, these are corporate acts sufficient to show that the petitioner is a corporation *de facto*.⁶

§ 398. What corporations may have the power.—Only those corporations intending to devote their works to public

¹ *Chicago & W. I. R. Co. v. Illinois Central R. Co.*, 113 Ill. 156.

² *Nichols v. City of Bridgeport*, 23 Conn. 189; s. c. 60 Am. Dec. 636; *Bird v. Wilmington &c. R. Co.*, 8 Rich. Eq. 46; s. c. 64 Am. Dec. 739; *Bensley v. Mountain Lake Water Co.*, 13 Colo. 306; s. c. 73 Am. Dec. 575, and notes; *Lance's Appeal*, 55 Pa. St. 16; s. c. 93 Am. Dec. 722, and note; *Prather v. Jeffersonville &c. R. R.* 62 Ind. 37; *Darlington v.*

United States, 82 Pa. St. 389; and see *Kier v. Boyd*, 60 Pa. St. 34.

³ Mass. St. 1871, ch. 343; *Providence & W. R. Co. v. Norwich & W. R. Co.*, 138 Mass. 277.

⁴ *Colorado Eastern Ry. Co. v. Union Pac. Ry. Co.*, (1890) 7 Ry. & Corp. L. J. 373; *Chicago &c. R. Co. v. Chicago &c. R. Co.*, 112 Ill. 601.

⁵ *Chicago &c. R. Co. v. Chicago &c. R. Co.*, 112 Ill. 601.

⁶ *Ward v. Railroad Co.*, 119 Ill. 287.

use can obtain or exercise this power.¹ The principles involved in determining what companies are entitled to exercise the

¹ *Beekman v. Saratoga &c. R. Co.*, (1831) 3 Paige Ch. 72. Walworth, Chancellor, summed up the matter clearly and fully: "The constitution of the United States does not come in question in such cases. It is admitted that the complainant held the land in fee; and probably under a title derived from the crown, to the rights of which the people have now succeeded. A law declaring the grant from the crown void, and divesting his title on that ground, would impair the obligation of the contract. But it was no part of the contract between the crown and its grantees or their assigns, that the property should not be taken for public use, upon paying a fair compensation therefor, whenever the public interest or necessities required that it should be so taken. All separate interests of individuals in property are held of the government under this tacit agreement or implied reservation. Notwithstanding the grant to individuals, the *eminent domain*, the highest and most exact idea of property, remains in the government, or in the aggregate body of the people in their sovereign capacity; and they have a right to resume the possession of the property, in the manner directed by the constitution and laws of the State, whenever the public interest requires it. This right of resumption may be exercised not only when the safety, but also where the interest or even the expediency of the State is concerned; as where the land of the individual is wanted for a road, canal or other public improvement. The only restriction upon this power, in cases where the public or the inhabitants of any particular section

of the State have an interest in the contemplated improvement as citizens merely, is that the property shall not be taken for the public use without just compensation to the owner, and in the mode prescribed by law. The right of eminent domain does not, however, imply a right in the sovereign power to take the property of one citizen and transfer it to another, even for a full compensation, where the public interest will be in no way promoted by such transfer. And if the legislature should attempt thus to transfer the property of one individual to another, where there would be no pretence of benefit to the public by such exchange, it would probably be a violation of the contract by which the land was granted by the government to the individual or those under whom he claimed title, and repugnant to the constitution of the United States. But if the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain and to authorize an interference with the private rights of individuals for that purpose (2 Kent's Com. 340). It is upon this principle that the legislatures of several of the States have authorized the condemnation of the lands of individuals for mill sites, where, from the nature of the country, such mill sites could not be obtained for the accommodation of the inhabitants without overflowing the lands thus condemned. Upon the same principle of public benefit, not only the

power are ably expounded in the case cited in the foregoing note. A corporation organized for the purpose of supply-

agents of the government, but also individuals and corporate bodies, have been authorized to take private property for the purpose of making public highways, turnpike roads and canals; of erecting and constructing wharves and basins; of establishing ferries; of draining swamps and marshes; and of bringing water to cities and villages. In all such cases the object of the legislative grant of power, is the public benefit derived from the contemplated improvement, whether such improvement is to be effected directly by the agents of the government, or through the medium of corporate bodies, or of individual enterprise. And according to the opinion of Chief Justice Marshall, in the case of *Wilson v. The Blackbird Creek Marsh Company*, 2 Pet. 251, measures calculated to produce such benefits to the public, though effected through the medium of a private incorporation, are undoubtedly within the powers reserved to the States, provided they do not come in collision with those of the general government. It is objected, however, that a railroad differs from the other public improvements, and particularly from turnpikes and canals, because travellers can not use it with their own carriages and farmers can not transport their produce in their own vehicles; that the company, in this case, are under no obligation to accommodate the public with transportation; and that they are unlimited in the amount of tolls which they are authorized to take. If the making of a railroad will enable the traveller to go from one place to another without the expense of a carriage and horses, he derives a greater

benefit from the improvement than if he was compelled to travel with his own conveyance over a turnpike road at the same expense. And if a mode of conveyance has been discovered by which the farmer can procure his produce to be transported to market at half the expense which it would cost him to carry it there in his own wagon and horses, there is no reason why the public should not enjoy the benefit of the discovery. And if any individual is so unreasonable as to refuse to have a railroad made through his lands, for a fair compensation, the legislature may lawfully appropriate a portion of his property for the public benefit, or may authorize an individual or a corporation thus to appropriate it, upon paying a just compensation to the owner of the land for the damage sustained. The objection that the corporation is under no legal obligation to transport produce of passengers upon this road at a reasonable expense, is unfounded in fact. The privilege of making a road and taking tolls thereon is a franchise, as much as the establishment of a ferry or a public wharf and taking tolls for the use of the same. The public had an interest in the use of the railroad, and the owners may be prosecuted for the damages sustained, if they refuse to transport an individual, or his property, without any reasonable excuse, upon being paid the usual rate of fare. The legislature may also, from time to time, regulate the use of the franchise and limit the amount of toll which it shall be lawful to take, in the same manner as they may regulate the amount of tolls to be taken at a ferry, or for grinding at a mill,

ing the inhabitants of a city with water, may exercise the right of eminent domain for the acquisition of land needed as a reservoir.¹ And a law which authorizes the water company therein named to take, detain, and use the water of a certain pond and all streams tributary thereto, does not restrict the company to such a taking as will not interfere with the natural flow of the stream below the pond, nor to a detention of the waters in reservoirs outside of the pond, but authorizes it to detain such waters in the pond itself.² So again, under a law which gave to a city the right to take the waters of a certain pond, the waters flowing into it, and ponds and streams within four miles, and any water rights connected therewith, it has been held that under a condemnation in terms as broad as the language of the statute, all the waters of any stream running into the pond were taken, and an existing right to pollute the waters of such a stream.³ In California it has been held that the right of eminent domain can not be exercised in favor of the owners of mining claims, to enable them to obtain water for their own use in working such claims, though the intention may also be to supply water to others for mining and irrigating purposes.⁴

§ 399. The same subject continued.—The best examples of public use, and the most frequent exercise of the power of eminent domain, occur in securing means of transportation and intercommunication between different portions of the State.⁵ Thus railroad companies, being common carriers, their use of property is a public one.⁶ Pipe lines also have been given the same rights as railroads.⁷ The power of the State to condemn

unless they have deprived themselves of that power by a legislative contract with the owners of the road."

¹ Lake Pleasanton Water Co. v. Contra Costa Water Co., 67 Cal. 659.

² Ingraham v. Camden &c. Water Co., (1890) 19 Atlan. Rep. 861.

³ Martin v. Gleason, 139 Mass. 183.

⁴ Lorenz v. Jacob, 63 Cal. 73.

⁵ Mills on Em. Dom. § 14; Buffalo &c. R. Co. v. Ferris, 26 Tex. 588;

O'Hara v. Lexington &c. R. Co., 1 Dana, 232.

⁶ Buffalo &c. R. Co. v. Brainerd, 9 N. Y. 100; Beekman v. Saratoga &c. R. Co., 3 Paige, 45; Raleigh &c. R. Co. v. Davis, 2 Dev. & B. 451; Swan v. Williams, 2 Mich. 427; Tracy v. Elizabethtown &c. R. Co., 80 Ky. 259.

⁷ West Virginia &c. Co. v. Oil Co., 5 W. Va. 332.

land for the use of canal, ferry, turnpike and bridge companies has never been denied.¹ An act in relation to telegraph companies, authorizing the condemnation of the right of way, is constitutional. The use contemplated is a public not a private one.² Companies in accepting the benefits of this law, lay themselves under obligation to the public to permit the use of their lines to all persons under reasonable regulations, and this obligation may rest upon implication.³ The right of telegraph companies to lay lines, etc., is the same in streets of the District of Columbia as over post roads generally, under the law. And when the district commissioners have authorized the construction of an overhead line along a business street with poles at certain intervals, the construction will not be enjoined at the instance of a few store-keepers who consider it a nuisance.⁴ Where a telegraph company condemns a strip of land on which to place its line, it acquires no fee in the soil; there is no obligation to maintain a fence; the owner of the fee can not be excluded from the strip; and a strip half a rod in width is not an unreasonable quantity of land to condemn for the purpose.⁵ Telephone lines are entitled to the same privileges upon the same principle.⁶ Formerly mills, especially grist mills, were considered of public use so as to justify the exercise of the power of eminent domain in their behalf. But mill corporations can now expect such privileges only in jurisdictions where precedent is too strong to be departed from. In most cases they will not be granted. The reasons for encouraging mills in early times, when capital was small and steam as a motive power had not been discovered, have largely ceased to exist, and there is now no reason for indulging owners of mills over owners of public groceries,

¹ Mills on Em. Dom. § 14, and authorities there cited.

² *State v. American & European Commercial News Co.*, 43 N. J. L. 381; *Pierce v. Drew*, 136 Mass. 75; *New Orleans Tel. Co. v. Southern Tel. Co.*, 53 Ala. 211.

³ *State v. American & European Commercial News Co.*, 43 N. J. L. 381.

⁴ *Hewett v. Western Union Telegraph Co.*, 4 Mackey, (D. C.) 424; s. c. 54 Am. Rep. 284; U. S. Act of July 24, 1886; U. S. Resolution, March 3, 1863.

⁵ *Lockie v. Mutual Union Telegraph Co.*, 113 Ill. 401.

⁶ *Irwin v. Telephone Co.*, 37 La. An. 63; *Telephone & C. Co. v. Forke*, 2 Tex. App. 367.

hotels or theatres.¹ Public draining companies may have the right of eminent domain;² more especially as a swamp may in itself be a nuisance, and its reclamation a public benefit.³ But a private undertaking will not be favored with this power though the work is done by a corporation formed for purposes of drainage.⁴ Dam and boom companies have been accorded this privilege.⁵

§ 400. Public property taken by eminent domain — What property may be taken.— Land already devoted to a public use may be condemned and taken for a more important use. Thus a company authorized to construct a railroad between two points, may occupy any lands of the State on the general route laid down, and it makes no difference that the location crosses land purchased for the use of a State institution, which will not thereby be materially interfered with.⁶ But under other circumstances it has been held that land already devoted to the public use for a blind asylum could not be so taken.⁷ When State land is taken, it must be paid for as in the case of an individual proprietor.⁸ Land within a State and held by the United States, is liable to condemnation, for streets, roads and railroads like the lands of a private person.⁹ But here again, if the land is already occupied and used for a pub-

¹ Mills on Em. Dom. § 14, and cases cited; *Jordan v. Woodward*, 40 Me. 317.

² *Willson v. Blackbird &c. Co.*, 2 Pet. 245; *Henry v. Thomas*, 119 Mass. 583; *Dingley v. Boston*, 100 Mass. 544; *Hartwell v. Armstrong*, 19 Barb. 166; *Tidewater Co. v. Coster*, 18 N. J. Eq. 518; *Norfleet v. Cromwell*, 70 N. C. 634; *Anderson v. Kerns Draining Co.*, 14 Ind. 199; *Anderson v. Baker*, 98 Ind. 587; *McQuillan v. Hatton*, 42 Ohio St. 202; *Cheesbrough v. Commissioners*, 37 Ohio St. 508.

³ *Dingley v. Boston*, 100 Mass. 544.

⁴ *Anderson v. Kerns Draining Co.*, 14 Ind. 199.

⁵ *Weaver v. Mississippi Boom Co.*, 28 Minn. 534; *Patterson v. Boom Co.*,

3 Dill. 465; *Lancaster v. Kennebeck Co.*, 62 Me. 272; *Lawler v. Baring Boom Co.*, 56 Me. 443; *Cotton v. Boom Co.*, 22 Minn. 372; *Schoff v. Improvement Co.*, 57 N. H. 110.

⁶ *Indiana Central R. Co. v. State*, (1852) 3 Ind. 421.

⁷ *St. Louis &c. R. Co. v. Blind Inst.*, 43 Ill. 303.

⁸ *Commonwealth v. Boston R. Co.*, 3 Cush. 25. But in some States a gift of the land by the State is presumed from the authority to enter thereon. *Pennsylvania R. Co. v. New York &c. R. Co.*, 23 N. J. Eq. 157; *Davis v. East Tennessee &c. R. Co.*, 1 Sneed, 94.

⁹ Mills on Em. Dom. § 350; *United States v. Railroad Bridge*, 6 McLean, 517.

lic use, as for a fort, light-house or armory, it can not be taken for an ordinary local though public use.¹ A State legislature can authorize the use of the public streets of a municipality by a telephone company as a location for its poles.² So a street railway may be given right of way along public streets. In several of the American States, however, the constitutions prohibit the passage of any law authorizing the construction of street railways in towns or cities, without the consent of the local authorities.³

§ 401. The same subject continued.—The property of a corporation may be condemned to the use of another under the same power.⁴ The taking of the property of a corporation is not an alteration, modification, or repeal of its charter. It is the enforced purchase of its property.⁵ And of course land which is owned by a railroad company, and which it expects at some future time to use for railroad purposes, but which it has held for several years without using in any way, is subject to condemnation for the right of way of another company.⁶ Mere priority of acquisition, or even of occupa-

¹ *United States v. Chicago*, 7 How. 185; *United States v. Railroad Bridge*, 6 McLean, 517; *United States v. Ames*, 1 Woodb. & M. 76; *Union Pac. R. Co. v. Burlington &c. R. Co.*, 3 Fed. Rep. 106; *Grintner v. Kansas &c. R. Co.*, 23 Kan. 642.

² *Irwin v. Great Southern Telephone Co.*, 37 La. Ann. 63, Manning, J., dissenting.

³ *Stimson's Am. Stat. Law*, (1886) § 476, citing the constitutions of West Virginia, Missouri, Texas, Georgia, Alabama, Pennsylvania, Illinois and Colorado. Or of the electors. Neb. Const., (1875) art. 13, § 2.

⁴ *Mills on Em. Dom.* § 41; *Trustees v. Salmond*, 11 Me. 109; *Jeffersonville &c. R. Co. v. Dougherty*, 40 Ind. 33; *Illinois Canal v. Chicago &c. R. Co.*, 14 Ill. 314; *East &c. R. Co. v. East Tennessee &c. R. Co.*, 75 Ala. 275.

⁵ *Mills on Em. Dom.* § 41; *Grand Junction R. Co. v. Middlesex*, 14

Gray, 553; *Boston &c. R. Co. v. Salem &c. R. Co.*, 2 Gray, 1; *State v. Hudson Tunnel Co.*, 38 N. J. 548.

⁶ *Colorado Eastern Ry. Co. v. Union Pac. Ry. Co.*, (1890) 7 Ry. & Corp. L. J. 373. The court instructively sums the matter up thus: It is next insisted by defendant that the land sought to be condemned has already been appropriated by it to its use as a public railroad corporation or at least that it acquired it by purchase, with a view to such use, and that it is highly probable it will in the near future become a necessity to its increasing business. The evidence shows that this land is a part of a body of twelve acres which was purchased by one McCullah, in 1881, for defendant. This witness stated: "I received my orders to purchase it from Mr. Egbert, (representative of defendant road.) He told me to go and buy it; buy it

tion, gives no exclusive right, except in so far as the condemnation trenches upon the greater necessities of the other fran-

quick, before the Burlington parties could get it." The Burlington was the Burlington & Missouri Valley Railroad, about to build into Denver, and seeking terminal facilities. Mr. Choate, superintendent of defendant road, testified, substantially, that this piece of land was acquired for the reason that the Burlington Railroad was trying to get an entrance into the city, and to injure defendant's property, and it was necessary to buy this to keep that road from getting into their yards. He further stated that in his opinion this land would in the near future become necessary for the use of defendant, for additional turn-outs and switch yards, and that they would have so improved it but for the lack of funds, and it was yet their purpose to so use it. It appears, however, from the evidence, that the only work done upon this piece of land was the construction of some embankments along or across it prior to 1885, and before Mr. Choate took charge as superintendent. These embankments have washed away somewhat, and were on grades below that of defendant's railroad track, and not at an elevation at all suitable for switches or turn-outs from the main track. No buildings of any sort have ever been constructed upon it, and no other use made of it. Without imputing to the defendant company the selfish and indefensible motive of being actuated in the acquisition of this land by a desire to obstruct the Burlington road's access to the Union depot, the very utmost that can be conceded to the defendant is that it entertained the belief that this piece of ground might become necessary

to the full accommodation of its business in the future, and that it expects to so apply it. This is but a prospective dedication, which may or may not ever be made. If the defendant were seeking to condemn this property upon a prospective increase of its business, "it should be established beyond reasonable doubt that such increase will occur." (*Railroad Co. v. Davis*, 43 N. Y. 145.) While not holding defendant to the same rigorous rule as if it were seeking to condemn this property, yet "no one can blink so hard as not to see," from the evidence as a whole, that the defendant has not for five years done any other act looking to the subjection of this piece of ground to its use; and if it is held exempt from the exercise of the right of eminent domain, it rests for its foundation upon conjecture, or a contingency that no court can say with assurance will ever arise. The evidence shows that this defendant has a large amount of other land, some two hundred and seventy-five acres, in Denver, appurtenant to its line of railroad, a part of which, at least, can be made quite available for any use similar to that for which it claims to hold this. In view of its greater necessity to the petitioner, as already demonstrated, I feel constrained to hold, both on reason and authority, that this mere prospective use by defendant should yield to the more immediate necessities of the petitioner. *Springfield v. Railroad Co.*, 4 Cush. 63; *Illinois & M. Canal Co. v. Chicago & R. I. R. Co.*, 14 Ill. 314; *Prospect Park v. Williamson*, 91 N. Y. 552; *Eastern R. Co. v. Boston & M. R. Co.*, 111 Mass. 125; *Grand Rapids, N. & L. S. R. Co. v. Grand*

chise.¹ One company can not, however, condemn part of the property of another for the construction of its road without compensation. The fact that property has been taken for a particular public use does not make it public property for all purposes. And the property rights of a railroad company in its right of way, are protected by the same restrictions against appropriation by any other company for railroad purposes or other public use, as is afforded by the constitution and laws in the case of the private property of an individual.² The corporate franchise and the property, when inseparable, can be taken together, compensation being made for both.³ Franchises are held in subordination to the exercise of eminent domain, and must yield to its proper exercise. The investiture of the franchise is not absolute. Conditions enter into all contracts, superinduced by the pre-existing and higher authority of the laws of nature, of nations, or of the community. There is no distinction between corporeal and incorporeal property, and a franchise is as subject to the power of eminent domain as any other property.⁴

§ 402. Compensation for property taken.—An arbitrary schedule of damages to be paid can not be established, but there must be a fair appraisalment by an independent tribunal.⁵ Where land is taken by a water company, its fair market

Rapids & I. R. Co., 35 Mich. 265; s. c. 24 Am. Rep. 545, and note.

¹ East St. L. C. Ry. Co. v. East St. L. U. Ry. Co., 108 Ill. 265; Lake S. & M. S. Ry. Co. v. Chicago & W. I. R. Co., 97 Ill. 506.

² Grand Rapids &c. R. Co. v. Grand Rapids &c. R. Co., (1877) 35 Mich. 265.

³ West River & Co. v. Dix, 6 How. 507; Crosby v. Hanover, 36 N. H. 404.

⁴ Mills on Em. Dom. § 42; West River Bridge v. Dix, 6 How. 507; Enfield Toll Bridge Co. v. Hartford &c. R. Co., 17 Conn. 40; Backus v. Lebanon, 11 N. H. 19; Central Bridge v. Lowell, 15 Gray, 106; New York

&c. R. Co. v. Boston &c. R. Co., 36 Conn. 196; Salem Turnpike v. Syme, 18 Conn. 451; James River Co. v. Thompson, 3 Gratt. 270; Tuckahoe Canal Co. v. Tuckahoe R. Co., 11 Leigh, 42; Lafayette Plank Rd. v. New Albany &c. R. Co., 13 Ind. 90; Newcastle &c. R. Co. v. Peru &c. R. Co., 3 Ind. 464; Pennsylvania R. Co.'s Appeal, 93 Pa. St. 150; Lake Shore Ry. v. Chicago &c. R. Co., 97 Ill. 506; Dunlap v. Toledo &c. Ry. Co., 50 Mich. 470.

⁵ Mills on Em. Dom. § 85; Cunningham v. Campbell, 33 Ga. 625; Cox v. Cummings, 33 Ga. 549; Kramer v. Cleveland &c. R. Co., 5 Ohio St. 140.

value measures the damage, not its value for a storage basin.¹ The difference in value of land before taking any part of it for a public improvement and the value of the part left after the completion of the improvement, as effected by it, is the fair measure of damage to the owner resulting from the appropriation. And this same rule is applied in case of buildings, machinery, and other property.² In an action for damage caused by the construction of a railroad through an eight-acre tract of land, it appeared that separated from it by a public road was another tract of sixteen acres, also owned by plaintiffs, but which was untouched and unaffected by the railroad. Both parties introduced evidence as to the value of the sixteen acres, to which no exception was taken; and neither party moved to strike out the evidence or asked for instructions thereon; and it was held that a charge was not erroneous which allowed the jury to add the sixteen acres to the eight acres,

¹ *Moulton v. Newburyport Water Co.*, 137 Mass. 163.

² *Hot Springs R. Co. v. Tyler*, 36 Ark. 205; *Little Rock & c. Ry. Co. v. Allen*, 41 Ark. 431; *Texas & c. Ry. v. Kirby*, 44 Ark. 103; *San Francisco & c. R. Co. v. Caldwell*, 31 Cal. 367; *Eberhart v. Chicago & c. Ry. Co.*, 70 Ill. 347; *Chicago & c. R. Co. v. Stein*, 76 Ill. 41; *City of Bloomington v. Miller*, 84 Ill. 621, where a certain amount was awarded for the value of the land taken and half as much more for the depreciation of the part of the lot that was left; *Dupins v. Chicago & c. Ry. Co.*, 115 Ill. 97; *Sidener v. Essex*, 22 Ind. 201; *Sater v. Burlington & c. Co.*, 1 Iowa, 386; *Henry v. Dubuque & c. R. Co.*, 2 Iowa, 288; *Fleming v. Chicago & c. R. Co.*, 34 Iowa, 353; *Harrison v. Iowa & c. R. Co.*, 36 Iowa, 323; *Renwick v. Dubuque & c. R. Co.*, 49 Iowa, 664; *Ham v. Wisconsin & c. Ry. Co.*, 61 Iowa, 716; *Missouri River & c. R. Co. v. Owen*, 8 Kan. 409, in which case the measure of recovery was said to be the amount of damages, and interest from the time of the

appropriation of the land, and that the damages were properly shown by evidence of the value of the land immediately before and after the location of the road; *Atchison & c. R. Co. v. Blackshire*, 10 Kan. 477; *Dwight v. County Comm'rs of Hampden*, 11 Cush. 201; *Virginia & c. R. Co. v. Henry*, 8 Nev. 165; *New York & c. Ry. Co. v. Chrystie*, 29 Hun, 646; *Schuylkill Nav. Co. v. Thoburn*, 7 Serg. & R. 411; *East Brandywine & c. R. Co. v. Ranck*, 78 Pa. St. 454; *Shenango & c. R. Co. v. Braham*, 79 Pa. St. 447; *Cummings v. City of Williamsport*, 84 Pa. St. 473; *Pittsburg & c. Ry. Co. v. Bentley*, 88 Pa. St. 178, where it was said the true rule for valuing damages as a whole is the difference between the value of the property before the making of the road and its value after the road is made, as affected by it. *Philadelphia & c. R. Co. v. Getz*, 113 Pa. St. 214. In this last case it was held that if the location of a railroad so affects the property as to compel the removal of the business conducted by tenants from year

and, from the value thus ascertained, deduct the value of the tract taken.¹ In determining the value of the right of way taken for a railroad, evidence of beds of coal in the land is admissible to show the true character of the land, but is to be considered only so far as it affects the market value of the land.² An instruction that the jury were not to regard the injury caused by frost and insects after the date of the writ as a distinct ground of damage, but that the true measure was the diminution in value of the land for cranberry culture, was proper.³ It is not necessary to instruct the jury that the landowner retains the fee, notwithstanding the condemnation of a right of way in the land.⁴

§ 403. Eminent domain in case of street railways.—The use of a street by a horse railroad company is a mere modification of an existing servitude. The servitude is not new because the vehicle is new. It is simply the right to lay tracks in streets already appropriated to the uses of public travel for the purpose of facilitating such travel.⁵ It is not competent, however, for a railway to be constructed for private use through the streets of a city, even with the consent of the city, and a perpetual injunction will lie in favor of any abutting property-owner who would be injured thereby.⁶ The operation of a street railroad by mechanical power, when authorized by law, on a public street, is not an additional servitude or burden on land already dedicated or condemned to the use of a public street, and is therefore not a taking of private property, but is a modern and improved use, only, of the street as a public highway, and affords to the owner of the abutting

to year to another place, and the machinery used in the business is in consequence depreciated as it stands, the difference in the value of the machinery in connection with the business conducted on the property and its value when removed and applied to the same or other use, is a proper element of damage to be considered by the jury; and also that in ascertaining the value of the machinery as it stood after the injury, evidence as to the expense of

removing it from the property to a new place of business is admissible.

¹ *Baltimore & P. R. Co. v. Sloan*, (1890) 7 Ry. & Corp. L. J. 217.

² *Doud v. Mason City & F. D. R. Co.*, (1889) 76 Iowa, 438.

³ *Howes v. Grush*, 131 Mass. 207.

⁴ *Clayton v. Chicago & c. Ry. Co.*, 67 Iowa, 238; *Cummins v. Des Moines & c. S. L. Ry. Co.*, 63 Iowa, 397.

⁵ *Mills on Em. Dom.* § 205, and cases cited.

⁶ *Mikesell v. Durkee*, 34 Kan. 509.

property, though he may own the fee of the street, no legal ground of complaint.¹ The difference between railroads for general traffic and street railroads consists in their use, and not in their motive power. A railroad, the rails of which are laid to conform to the grade and surface of the street, and which is otherwise constructed so that the public is not excluded from the use of any part of the street as a public way; which runs at a moderate rate of speed, compared to the speed of traffic railroads; which carries no freight, but only passengers, from one part of a thickly populated district to another in a town or city, and its suburbs, and for that purpose runs its cars at short intervals, stopping at the street crossings to receive and discharge its passengers — is a street railroad, whether the cars are propelled by animal or mechanical power. Accordingly, where a city is authorized by its charter to contract for the construction of street railroads, it may authorize railroads of that character to be operated by animal or mechanical power.² But in determining whether or not cable railways should be constructed through certain streets in New York city, the company assuming to act under a certain stat-

¹ *Williams v. City Electric &c. Ry. Co.*, (1890) 41 Fed. Rep. 556; s. c. 7 Ry. & Corp. L. J. 448; *Briggs v. Lewiston &c. R. Co.*, 79 Me. 363; *Newell v. Minneapolis R. Co.*, (1886) 35 Minn. 112; *People v. Kerr*, 27 N. Y. 204.

² *Williams v. City Electric Street Ry. Co.*, (1890) 41 Fed. Rep. 556; s. c. 7 Ry. & Corp. L. J. 448, where the court said: "The difference between street railroads and railroads for general traffic is well understood. The difference consists in their use, and not in their motive power. A railroad, the rails of which are laid to conform to the grade and surface of the street, and which is otherwise constructed so that the public is not excluded from the use of any part of the street as a public way; which runs at a moderate rate of speed, compared to the speed of traffic rail-

roads; which carries no freight, but only passengers, from one part of a thickly populated district to another in a town or city and its suburbs, and for that purpose runs its cars at short intervals, stopping at the street crossings to receive and discharge its passengers, is a street railroad, whether the cars are propelled by animal or mechanical power. The propelling power of such a road may be animal, steam, electricity, cable, fireless engines or compressed air — all of which motors have been and are now in use for the purpose of propelling street cars. *Encyclop. Britannica*, (9th ed.) tit. 'Tramways.' Doubtless other methods of propelling the cars of street railroads will be discovered and applied. The legislature having empowered the city to authorize the construction of street railroads, without qualifica-

ute, authorizing steam railroads in streets, it was held, that it would prove too great an inconvenience to the public, as to some of the more narrow streets; and that cable railways did not fall within the meaning of the act.¹ The provision of the New York constitution, setting forth certain conditions to be complied with in the building of street railways, does not preclude the legislature from imposing other conditions.² So no rights are vested under the statute, under which a company assumes to act, which could not be impaired by a subsequent statute, covering the same subject, and passed before the right to construct has been acquired; and the case is not affected by the mere fact that a large sum of money has been expended for the services and expenses of the commissioners.³ But

tion or restrictions as to the motive power to be used on such roads, the city had the undoubted right to authorize animal or mechanical power to be used as motors on such roads. Sections 5468-5471, *Mansf. Dig.*, relate to railroads for the general traffic, and not to street railroads, whether propelled by animal or mechanical power. It would be a useless consumption of time to cite authorities to show that it would be competent for the city, under its charter, to authorize the construction and operation on the streets of the city, of a street railroad propelled by animal power, without providing for compensation to the abutting lot owners; but the learned counsel for the plaintiff insists that the rule is different where the propelling power is steam. The distinction attempted to be drawn between animal and mechanical power as applied to street railroads, is not sound. The motor is not the criterion. It is the use of the street and the mode of that use. A street railroad propelled by animal power might be so constructed and operated as to be a public nuisance, and render its owners liable to those injured by its improper construction and operation.

The same is true of a street railroad operated by mechanical power. It may be so constructed and operated as to be a public nuisance, but the use of steam on such a railroad, when authorized by law, does not *per se* make it a nuisance, or entitle the owners of the abutting property to compensation, though the fee of the street is vested in them. It is common knowledge that steam motors for operating street railroads are now constructed to emit so little gas, steam, or smoke, and make so little noise, that they do not constitute any reasonable ground of complaint to passengers or the public. They can be stopped and started as quickly and as safely as horse-cars, and in some respects can be operated with greater accuracy and precision. Such motors are in use in cities and their suburbs in this country and in England. *Encyclop. Britannica*, (9th ed.)."

¹ *In re New York Cable Ry. Co.*, 40 Hun, 1.

² *In re Thirty-Fourth Street R. Co.*, 102 N. Y. 343; N. Y. Const. art. iii, § 13.

³ *In re New York Cable Ry. Co.*, 40 Hun, 1.

where a street railway company is empowered by its charter to construct its road along such streets as a municipal corporation shall authorize, the corporation by delegating that authority enters into a contract, which it has no power by a subsequent act to rescind.¹ And where a street railway was built and operated under a general act of the legislature, by which it was relieved from repairing the street outside its tracks, and an ordinance was afterwards passed by the city council, requiring railroads to repair the streets for a distance of one foot beyond their tracks, subsequently to which the company was authorized by the city to extend its road, the ordinance was held to apply to the extension.² In Louisiana the right of a street railway company to use the public streets may be assigned by mortgage.³

§ 404. Incidental powers of railways — (a) To run steamboats.— Without legislative authority railway companies may not run steamship lines.⁴ So, it is held that a railway can not secure the capital and guarantee the profits of a steamboat company run in connection with its line.⁵ And a corporation, chartered to construct and operate a railroad, and to organize and carry on a banking business, has no authority to enter into a partnership with a private individual to purchase and run a steamboat on a river forming no part of its route.⁶ But under an express power to build and run steamboats, a railway company may employ the boats of others and guaranty that their gross earnings shall not fall below a certain amount.⁷ And it has been held that a railway corporation as well as a natural person may become a joint owner of a ferry, if its

¹ *People v. Chicago West Division Ry. Co.*, 18 Ill. App. 125.

² *St. Louis v. Missouri R. Co.*, 13 Mo. App. 524.

³ *New Orleans &c. R. Co. v. Delaware*, 114 U. S. 501.

⁴ *Pearce v. Madison &c. R. Co.*, 21 How. 441; *Hoagland v. St. Joseph R. Co.*, 39 Mo. 460.

⁵ *Colman v. Eastern Counties Ry. Co.*, (1846) 10 Beav. 1; *Browne & Theobald's Railway Law*, 96.

⁶ But the corporation can not defeat liability for an injury caused by

the negligence of an officer on a steamboat with the plea that the running of the steamboat was *ultra vires*. *Central R. & Banking Co. v. Smith*, 76 Ala. 572; s. c. 52 Am. Rep. 353.

⁷ As where a railroad corporation, whose road extended from Lake Michigan to the Mississippi river, was authorized to make "such contracts as the management of its railroad and the convenience and interests of the corporation might require," and "to build and run as a

charter and constitution do not preclude it, and, like a natural person, may compel an account for its share of the earnings without any question upon this point.¹ So a railway company, bound to supply boats for a ferry, may employ the boats when not wanted for the ferry in excursions to places not mentioned in its acts.² And it has been held as too plain to need authority that a railroad company, authorized to contract for the transportation and delivery of passengers and freight beyond its termini, may purchase a steamboat to run from the terminus to a point beyond.³

§ 405. (b) **To do other connected business.**—A railway may build side tracks to the establishments of large shippers, as a power incidental to its expressly granted powers.⁴ And it has been held that a statute empowering a railway company to build “branches of railroads,” authorized the construction of a short elevated road from the original terminus of its route along a public landing.⁵ So a railway may cart freight from and to its depots.⁶ And it may subscribe to secure the permanent location of a State fair upon its line.⁷ It may erect telegraph lines along its route, within its right of way, by itself, or by contract with a telegraph company which furnishes the railway telegraph facilities in the transaction of its business.⁸ And such a contract between a railway company and

part of its corporate property such number of steamboats as they may deem necessary,” and “to accept from any other State and use any powers or privileges . . . applicable to the carrying of persons and property by railway or steamboat,” it was held, to have the power to employ steamboats belonging to others, running from its eastern terminus along the Great Lakes eastward, to carry passengers and freight in connection with its own road, and to guaranty that the gross earnings of the boats should not be below a certain sum. *Green Bay & Co. R. Co. v. Union Steamboat Co.*, (1882) 107 U. S. 98.

¹ *Hackett v. Multnomah Ry. Co.*,

(1885) 12 Oregon, 124; s. c. 53 Am. Rep. 327.

² *Forest v. Manchester & Co. Ry. Co.*, 30 Beav. 40; *Browne & Theobald's Ry. Law*, 96.

³ *Shawmut Bank v. Plattsburg & Co. R. Co.*, (1859) 31 Vt. 491.

⁴ *Wilson v. Furness Ry. Co.*, L. R. 9 Eq. 28.

⁵ *McAboys Appeal*, 107 Pa. St. 548.

⁶ *Attorney-General v. Grand Trunk Ry. Co.*, 16 Dec. des Trib. (L. C.) 9.

⁷ *State Board v. Citizens' Street R. Co.*, 47 Ind. 407.

⁸ *Prather v. Western Union Telegraph Co.*, (1883) 89 Ind. 501; *Western Union Telegraph Co. v. Rich*, (1878) 19 Kan. 517; s. c. 27 Am. Rep. 159.

the telegraph company, providing that the former shall have its telegraphic business conducted free of charge, may stipulate that the latter shall have exclusive use of the right of way belonging to the railway, and that the railway company will discourage competition with it.¹ But in a somewhat similar case, the exclusive privilege of erecting lines of telegraphic communication along the road was declared void as in restraint of trade and contrary to public policy.² A railway company may maintain restaurants for its passengers.³ It may charge for the use of machines for weighing goods at stations.⁴ A railroad company can, for the protection of its property, issue a printed circular offering a general standing reward "for the arrest, with proof to convict, of any person for the malicious obstruction of" its tracks, and such offer is binding on the company.⁵ And such a company may, out of its funds, give gratuities to servants or directors of the company.⁶

§ 406. (c) Connected business that is not allowable.—

The power to own or operate a canal, or any part thereof, is not incidental to a railway company;⁷ nor has it power to improve the navigation of a stream upon which it has extensive wharves whose business is failing by reason of the deterioration of the river as a water-way.⁸ By the constitution of Pennsylvania, a company doing business as a common carrier can not engage in mining or manufacturing articles for transportation over its route, nor directly or indirectly engage in any other business; nor hold any land except such as is necessary to its

¹ *Western Union Tel. Co. v. The Chicago &c. R. Co.*, (1887) 86 Ill. 246. In this case and in *Western Union Tel. Co. v. Atlantic &c. Tel. Co.*, (1877) 7 Biss. 367, it was practically held that such a grant of exclusive privileges was inoperative to prevent another telegraph line being built along the line of the road, and therefore not contrary to public policy.

² *Western Union Tel. Co. v. Burlington &c. Ry. Co.*, 3 McCrary, 180.

³ *Flanagan v. Great Western Ry. Co.*, L. R. 7 Eq. 116.

⁴ *London &c. Ry. Co. v. Price*, 11 Q. B. Div. 485; *Browne & Theobald's Railway Law*, 97.

⁵ *Central Railroad & Banking Co. v. Cheatham*, (1888) 85 Ala. 292; *Beach on Railways*, § 505.

⁶ *Hutton v. West Cork Ry. Co.*, 23 Ch. Div. 654; *Browne & Theobald's Railway Law*, 97.

⁷ *Plymouth R. Co. v. Colwell*, (1861) 39 Pa. St. 337.

⁸ *Munt v. Shrewsbury &c. Ry. Co.*, (1850) 13 Beav. 1.

business.¹ The same rule has been established by judicial decisions in England.² But after a company has already engaged in working collieries, an act authorizing it to dispose of them within five years, will legalize past workings and entitle the company to continue the workings down to the sale.³ It has been held also that neither a railroad corporation, nor one organized for the manufacture and sale of musical instruments, has the power to guaranty the payment of expenses of a musical festival, although the guaranty was made with the reasonable belief that the festival would be of great pecuniary benefit to the corporation, and expenses were incurred in reliance upon such guaranty;⁴ and a subscription of a railway company to the Imperial Institute has been held *ultra vires*.⁵ It is contrary to public policy for a railway company to give an express company exclusive privileges over its line, because such companies have been granted franchises for the public good which they must exercise impartially in favor of all.⁶ A contract to convey land to a railway company to secure the

¹ Pa. Const., (1874) art. xvii, § 5. But mining or manufacturing companies may carry their products over their own railways of fifty miles in length.

² Thus, a railway company has been held to have no implied authority to work coal mines, except for its own use, nor to deal in coal for purposes of profit. *Attorney-General v. Great Northern Ry. Co.*, 8 Week. Rep. 556; s. c. 1 Drew. & S. 154; *Browne & Theobald's Ry. Law*, 96.

³ *Ecclesiastical Commissioners v. North Eastern Ry. Co.*, 4 Ch. Div. 845; *Browne & Theobald's Ry. Law*, 96; *Beach on Railways*, § 518.

⁴ *Davis v. Old Colony R. Co.*, 131 Mass. 258; s. c. 41 Am. Rep. 221.

⁵ *Tomkinson v. South Eastern Ry. Co.*, 35 Ch. Div. 675; *Browne & Theobald's Ry. Law*, 97.

⁶ *Southern Express Co. v. Memphis &c. R. Co.*, 2 McCrary, 570; *Express*

Companies v. Railway Companies, 3 McCrary, 147; *Stanford v. Railroad Co.*, (1885) 24 Pa. St. 378; *Dinsmore v. Louisville &c. R. Co.*, 2 Flippin, 672; *New England Express Co. v. Maine Central R. Co.*, (1869) 57 Me. 188; s. c. 2 Am. Rep. 31. In the Pennsylvania case above cited the chief justice said: "The power to regulate the transportation on the road does not carry with it the right to exclude any particular individuals, or to grant exclusive privileges to others. Competition is the best protection to the public, and it is against the policy of the law to destroy it by creating a monopoly of any branch of business. It can not be done except by the clearly expressed will of the legislative power. Limited means may perhaps limit the amount of business done by a railroad company, but it can never furnish an excuse for appropriating all its energies to any particular individuals.

location of a station upon it, is contrary to public policy; for railway stations are presumably located with a view to the convenience of the public, and no other motive should be allowed to operate to influence their location.¹ This, however, is a mooted point, and there are authorities to the contrary.²

If it possessed this power it might build up one set of men and destroy others; advance one kind of business, and break down another; and might make even religion and politics the tests in the distribution of its favors. Such a power in a railroad corporation might produce evils of the most alarming character. The rights of the people are not subject to such corporate control. Like the customers of a grist mill they have a right to be served, all other things being equal, in the order of their applications. A regulation, to be valid, must operate on all alike. If it deprives any persons of the benefits of the road or grants exclusive privileges to others, it is against law and void." In the later Maine case Chief Justice Appleton states the law thus: "The very definition of a common carrier excludes the right to grant monopolies or to give special and unequal preferences. It implies indifference as to whom they serve, and an equal readiness to serve all who may apply, and in the order of their application. The defendants derive their chartered rights from the State. They owe an equal duty to each citizen. They are allowed to impose a toll, but it is not to be so imposed as specially to benefit one and injure another. They can not, having the means of transporting all, select from those who may apply, some whom they will, and reject others whom they can, but will not carry. They can not rightfully confer a monopoly

upon individuals or corporations. They were created for no such purpose. They may regulate transportation, but the right to regulate gives no authority to refuse, without cause, to transport certain individuals and their baggage or goods, and to grant exclusive privileges of transportation to others. The State gave them a charter for no such purpose."

¹ Beach on Railways, § 526; Fuller v. Dame, (1836) 18 Pick. 472; Pacific R. Co. v. Seely, (1870) 45 Mo. 212; 100 Am. Dec. 369; Bestor v. Wathen, 60 Ill. 138; St. Louis &c. R. Co. v. Mathers, 71 Ill. 592; s. c. 22 Am. Rep. 122; Marsh v. Fairbury &c. R. Co., 64 Ill. 414; s. c. 16 Am. Rep. 564; Linder v. Carpenter, 62 Ill. 309; St. Joseph &c. R. Co. v. Ryan, 11 Kan. 602; s. c. 15 Am. Rep. 357; Halladay v. Patterson, 5 Oreg. 177, where the company abandoned a shorter location of its road so as to pass and locate its depot at a particular place in consideration of the promise of defendant and others to pay certain sums therefor. See Williamson v. Chicago &c. R. Co., 53 Iowa, 126. Compare Workman v. Campbell, 46 Mo. 305.

² Cedar Rapids &c. Ry. Co. v. Spafford, 41 Iowa, 292; First National Bank v. Hendric, 49 Iowa, 402; s. c. 31 Am. Rep. 153. See Berryman v. Cincinnati R. Co., (1879) 14 Bush, 755, in which case a subscription of money to procure the location of a railway line through a certain city, was held binding.

§ 407. (d) **Contract for carriage.**—It seems to be a matter of course that a railroad company may make contracts for transportation for a fixed future period;¹ and even that a contract entered into by a railroad company, before the completion of its line, for the carriage of freight, is not necessarily *ultra vires* nor invalid.² But railway companies can not discriminate in rates between shippers, by allowing rebates to some shippers to the exclusion of others.³ They may, however, discriminate in rates between customers not in like condition, if the discrimination is fair and reasonable, where the object is to obtain competitive traffic.⁴ And it has been repeatedly held in such cases that in the absence of direct legislation, the rates are subject only to the common-law limitation of reasonableness.⁵ A railway company may make contracts for the transportation of freight and passengers beyond the termini of its own line.⁶ And it has even been held that where such a contract contemplated the provision by the railway company of a steam vessel to carry its passengers and freight to points beyond its terminus, the contract was valid.⁷ The company may arrange with other railway and steamboat companies the proportions, according to mileage or other-

¹ *Cleveland & Mahoning R. Co. v. Himrod Furnace Co.*, 37 Ohio St. 321; s. c. 41 Am. Rep. 509.

² And where it has been so far executed that the company has received the benefits thereof, it can not, while retaining such benefits, assert that it had no power to make the contract. *Louisville & c. Ry. Co. v. Flannagan*, (1888) 113 Ind. 488.

³ *Stewart v. Lehigh Valley R. Co.*, (1875) 38 N. J. L. 505; *Messinger v. Pennsylvania R. Co.*, (1874) 37 N. J. 531; s. c. 36 N. J. 407; s. c. 13 Am. Rep. 457. In the latter case Judge Bedle says: "Because the institution, so to speak, is public, every member of the community stands on an equality, as to right to its benefit, and, therefore, the carrier can not discriminate between individuals for whom he will render the service."

⁴ *Ragan v. Aiken*, (1882) 9 Lea, 609; s. c. 42 Am. Rep. 684; *Ex parte Benson*, (1882) 18 S. C. 38; s. c. 44 Am. Rep. 564; *Johnson v. Pensacola & c. R. Co.*, 16 Fla. 623, 667; s. c. 26 Am. Rep. 731; *Houston & c. Ry. Co. v. Rust*, (1882) 58 Tex. 98; *Munhall v. Pennsylvania R. Co.*, (1879) 92 Pa. St. 150.

⁵ *Ruggles v. Illinois*, 108 U. S. 536.

⁶ *Railroad Co. v. Pratt*, (1874) 22 Wall. 123; *Norfolk & c. R. Co. v. Shippers' & c. Co.*, (W. Va. 1887) 30 Am. & Eng. R. Cas. 57; *Kyle v. Laurens R. Co.*, (1857) 10 Rich. 382; *St. Louis & c. R. Co. v. Larnier*, (1882) 103 Ill. 293; *Wheeler v. San Francisco & c. R. Co.*, 31 Cal. 46.

⁷ *South Wales R. Co. v. Redmond*, (1861) 10 C. B. N. S. 675.

wise, for the division of the proceeds of that transportation between them.¹

§ 408. (e) **Traffic arrangements.**—Arrangements between railroad corporations to divide through fares and freights or to offer inducements by a reduction in rates to secure freights and travel over their lines, are contracts concerning their own authorized business, and not objectionable unless unconscionable.² While the power to fix charges for transportation of passengers and freight is a franchise which should be exercised by each company separately, yet, if they agree that both together shall regulate their rates, it is no abandonment or transfer of the franchise of either.³ The English Railway Clauses Act of 1845 gives special permission to one company to contract with other companies for the right of passage over their track.⁴ Under this statute a company may enter into an agreement, that another company shall use its line, paying tolls fixed with reference to the gross receipts, and providing for the carriage of local traffic on certain terms, provided there be no stipulation preventing the first company from exercising its statutory powers, or from entering into

¹ *Columbus &c. R. Co. v. Indianapolis &c. R. Co.*, (1853) 5 McLean, 450; *Elkins v. Camden &c. R. Co.*, (1882) 36 N. J. Eq. 241.

² *Morris &c. R. Co. v. Sussex R. Co.*, (1869) 20 N. J. Eq. 542.

³ *Columbus &c. R. Co. v. Indianapolis &c. R. Co.*, (1853) 5 McLean, 450. Where the action of the boards of directors of two corporations is alleged to be *ultra vires*, stockholders may bring suit to restrain the two corporations from consolidating. *Botts v. Simpsonville & B. C. Turnpike Co.*, (Ky. 1889) 10 S. W. Rep. 134.

⁴ And enacts that "for the purpose aforesaid, it shall be lawful for the respective parties to enter into any contract for the division or apportionment of the tolls to be taken upon their respective railways, with the proviso, however, that no such

contract shall in any manner affect, increase, or diminish, any of the tolls which the respective companies, parties to the contracts, shall for the time being be respectively authorized and entitled to demand or receive from any person or any other company, but that all other persons and companies shall, notwithstanding any such contract, be entitled to the use and benefit of any of the said railways, upon the same terms and conditions, and on payment of the same tolls as they would have been in case no such contract had been entered into." 8 Vic. ch. 20, § 88. And this has been construed, to give the right to contract for the privileges ordinarily attaching to such passage, of stopping at stations and taking up and putting down passengers and freight. *Simpson v. Denison*, 10 Hare, 51.

similar agreements with other companies or persons.¹ But the act does not authorize a railroad to confer upon another carrier running privileges over its road so extensive as practically to amount to a surrender of its franchises.² When a railroad company does more than make an ordinary contract with a connecting line for the transportation of passengers and merchandise and a division of receipts, and agrees to give the other company control or extensive running powers over its road, the contract is of questionable validity in view of the rule forbidding railroad companies to transfer their franchises or put it out of their power to serve the public as it was intended they should serve it, namely, through their own corporate management, and not by handing their property and franchises over to another corporation.³ It is thus of a contract by which a railroad company gives up all practical control over its own road, and in effect leases it to another company.⁴

¹ *Midland Ry. Co. v. Great Western Ry. Co.*, 8 Ch. 841; *Great Northern Ry. Co. v. Manchester &c. Ry. Co.*, 5 L. T. N. S. 667; *Browne & Theobald's Ry. Law*, 287.

² *Attorney-General v. Great Eastern Ry. Co.*, 11 Ch. Div. 449; *Gardner v. London &c. Ry. Co.*, L. R. 2 Ch. 212; *Johnson v. Shrewsbury &c. Ry. Co.*, 3 De Gex, M. & G. 914.

³ *Taylor on Corp.* § 308; *State v. Hartford &c. R. Co.*, 29 Conn. 538; *Johnson v. Shrewsbury &c. Ry. Co.*, 3 De G. M. & G. 914; *Garner v. London &c. Ry. Co.*, L. R. 2 Ch. 212.

⁴ *Ohio Ry. Co. v. Indianapolis &c. R. Co.*, 5 Am. L. Reg. N. S. 733; *Simpson v. Denison*, 10 Hare, 51; *Midland Ry. Co. v. Great W. Ry. Co.*, L. R. 8 Ch. 841; *Atty.-Gen. v. Great E. Ry. Co.*, 11 Ch. Div. 449; *Nauzatuck R. Co. v. Waterbury &c. Co.*, 24 Conn. 468, 482. In the principal case it was asked: "What then is the legal effect of the contract between the parties? It is to secure to the defendants the use of plaintiffs'

roadway for thirty years, on certain conditions, which are the equivalent for what otherwise would be denominated an annual rental: First. The defendants are permitted to lay down, at their own expense, upon the plaintiffs' structure, an additional rail, to remain there subject to all appropriate repairs by the defendants, to be used by them for the entire term. Second. The cars of the defendants are to be run over the road, and it is admitted have been drawn by the defendants' locomotives, under charge of their conductors, and with certain deductions, at their expense, the right to do so being co-extensive with the term already stated. If the plaintiffs merely engaged to be carriers of all the freight and passengers brought by the defendants to Lawrenceburg, from thence to Cincinnati, and receive therefor a fair equivalent, there would be no difficulty in giving such a construction to the agreement as would create a personal

§ 409. **Binding effect of traffic arrangements.**— Railway connections even when required by charter are but temporary arrangements, and the company accommodated may obtain an extension so as to do its own business, without continuing the connection.¹ This is so even where in consequence of the building of a road by an independent company from a point on another road in a diverging direction, the main road was induced to make expensive and permanent arrangements for the accommodation of the traffic brought to its line by the second road which acted virtually as a branch.² And in such case the connecting company may build a line from a point near such intersection parallel with the main road to the same terminal city, and discontinue the use of the facilities of the main line.³ The original contract for connection and traffic accommodation is not to be considered a permanent and perpetual one.⁴ And a legislative permission to connect the lines of railway companies imposes no obligation upon either company to do so, and it is optional to continue it.⁵ But if the connection be

obligation only between the parties; but in order to give it this effect, and secure to the defendants its full benefit, they must not only enjoy, but be protected in the enjoyment of what is in reality the easement growing out of, and dependent upon, the occupation of the plaintiffs' railway, for the entire period of the contract, uncontrolled by the plaintiffs so long as the conditions the defendants were bound to perform are properly fulfilled. If the plaintiffs are not bound to permit the defendants to use their road, the defendants can not be required to perform their part of the agreement; and if they do, the right to occupy is connected directly with the realty and is in effect a lease of the railway." *Winch v. Birkenhead &c. R. Co.*, 5 De Gex & S. 562; *Clay v. Rufford*, 5 De Gex & S. 769; *Beman v. Rufford*, 1 Sim. N. S. 550.

¹ *Boston &c. R. Co. v. Boston &c. R. Co.*, (1850) 5 Cush. 375.

² *Boston &c. R. Co. v. Boston &c. R. Co.*, (1850) 5 Cush. 375.

³ *Boston &c. R. Co. v. Boston &c. R. Co.*, (1850) 5 Cush. 375.

⁴ *Boston &c. R. Co. v. Boston &c. R. Co.*, (1850) 5 Cush. 375.

⁵ *Androscoggin &c. R. Co. v. Androscoggin R. Co.*, 52 Me. 417. Appleton, C. J., said in this case: "The duty or obligation thus imposed upon the railroad with which the connection is made, does not restrict it in the general management and control of its road. The obligation to receive and transport is subordinate to the general powers of the corporation to manage and control its property and determine its gauge. It authorized the connecting railroad to require the reception and transportation of all persons and property it transports to the rail with which it connected. It imposed upon the latter only the obligation to receive and to transport. It did not require the former to bring per-

under and by force of a contract, its continuance in certain cases may be enforced in equity.¹ In the case, however, of traffic arrangements, which are legally authorized, where mutual facilities are given, or where one company gives consideration to the other, a working agreement must be presumed to be irrevocable in the absence of evidence to the contrary.² Therefore, when two railroads agree to build a road between certain cities, to connect with each other at a given place, if one of the companies is about to change its gauge so as to break up the connection contemplated, an injunction will be granted, to prevent the change of gauge.³ A provision that the receipts from through traffic shall be apportioned between the companies according to their mileage, with an allowance for working expenses, is valid.⁴ But if the consideration amounts to a guaranty by the running company of the dividends upon the capital stock of the other, irrespective of the amount of traffic carried, the agreement is beyond the corporate powers.⁵ The words, "any future extension or branches," in a contract between two connecting railroad corporations for a division or drawback of freights and fares over the roads, "or any future extensions or branches of the same," must not be construed, in their general sense, to apply to extensions then unauthorized by the legislature, where there were unexhausted powers in the charter and sup-

sons or goods to be transported. It left the general rights of the corporation unaffected and unmodified, except as changed in this single respect."

¹ *Androscoggin &c. R. Co. v. Androscoggin R. Co.*, (1864) 52 Me. 434, citing *Columbus &c. R. Co. v. Indianapolis &c. R. Co.*, 5 McLean, 450; *Great Northern R. Co. v. Manchester &c. R. Co.*, 5 De Gex & S. 138.

² *Great Northern Ry. Co. v. Manchester &c. Ry. Co.*, 5 De Gex & S. 138; *Llanelly Ry. Co. v. London &c. Ry. Co.*, L. R. 7 H. L. 550; *Browne & Theobald's Ry. Law*, 287.

³ *Columbus &c. R. Co. v. Indian-*

apolis &c. R. Co., (1853) 5 McLean, 450.

⁴ *Llanelly &c. Co. v. London &c. Ry. Co.*, L. R. 7 H. L. 550.

⁵ *Simpson v. Dennison*, 10 Hare, 51; 16 Jur. 830; *Browne & Theobald's Ry. Law*, 288. Thus an agreement under which one company is to carry the whole traffic of the other company in consideration of such "toll" as will, when added to the net profits of the second company, make up its dividend to a certain amount, is not valid under this section. *Simpson v. Dennison*, 10 Hare, 51; 16 Jur. 830; *Browne & Theobald's Ry. Law*, 288.

plements, at the time of the contract, to build other extensions or branches, sufficient to meet the requirements of the words.¹

§ 410. Changing the motive power of street railways.—Although authorities upon the subject have not yet become at all numerous, it is not perhaps too early to hazard an opinion that the law is that an established street railway can not change its motive power of its own motion simply, if the change involves any great changes in the condition of the street temporarily or permanently, either in the physical condition of the street or in the relation of the railway vehicles to other vehicles and passengers using the streets.² An act providing for the construction of a system of pneumatic tubes for the transmission of letters, packages and merchandise by atmospheric pressure, can not be constitutionally amended under the same title to allow the construction of a railway to traverse an immense tubular tunnel for the transportation of passengers, the subject of the amended act not being consonant with its title.³ Where an act incorporating a street-railway company provides that the "tracks or road shall be operated and used by the corporation with steam, horse, or other power, as the city council may from time to time direct," the city may, after notice has been given, and an ordinance passed permitting the use of horse-power, pass a second ordinance, without further notice, changing the power to electricity.⁴ The power conferred on the city council to authorize the use of electricity as a motive power carries with it the power to authorize the erection of poles on the edge of the sidewalk, notwithstanding the act of incorporation provides that "said corporation shall not incumber any portion of the streets occupied by said tracks;" such poles not being an incumbrance, but a necessity for the successful operation of the road. The change of the power by which a street railway is operated from horse-power to electricity, and the erection of poles necessary for its operation, does not impose an

¹ *Morris &c. R. Co. v. Sussex R. Co.*, (1869) 20 N. J. Eq. 542.

² *Vide supra*, § 403, as to motors that may be authorized in the first instance.

³ *Astor v. Arcade Ry. Co.*, (1889) 113 N. Y. 93. *Vide supra*, § 27.

⁴ *Taggart v. Newport Street Ry. Co.*, (R. I. 1890), 19 Atlan. Rep. 326; s. c. 7 Ry. & Corp. L. J. 385.

additional burden on the abutting property owners.¹ Under a power to lay down and thereafter repair a horse railroad upon public streets, the company can not change its motive power to operate its road by means of a cable when to do so will necessitate extensive excavation of the streets.² The constitution of New York providing that no law shall authorize the construction or operation of a street railway except by consent of the owners of one-half the value of the abutting property and also of the local authorities in control of the street on which it is proposed to construct or operate such railroad, applies not only to proposed street railroads, but also to construction undertaken by corporations on their existing lines of railroad. Therefore a law authorizing any surface railroad to operate its road by cable or electricity, instead of animal or horse power, on consent of the owners of one-half in value of the abutting property, is unconstitutional, in that it dispenses with the consent of the local authorities.³ Upon the application of a petitioner for permission to make such a change, claiming that it did not seek to construct or operate a new road, but simply to change the motive power in the operation of a road which it had already the right to maintain and operate, it was held that the proposed change from horse power to cable power involved the building of an absolutely new road subjecting the streets of the city to new burdens, which under its original franchise the petitioner had no right to impose.⁴ Upon a previous application made in order to carry forward the same scheme the court said: "The relator had then no right to again disturb the surface of the streets, except for necessary repairs and replacing of its ties and rails as occasion might require, for the proper maintenance of its road. That power it had; no more. It now, however, asserts a legal right to make excavations, not for any of the purposes of its track or road-way, or the foundation of either, but for the purpose of laying a cable in each track between the pres-

¹ Taggart v. Newport Street Ry. Supp. 833; affirming s. c. 9 N. Y. Co., (R. I. 1890), 19 Atlan. Rep. 326; Supp. 686; N. Y. Const. art. iii, § 18; s. c. 7 Ry. & Corp. L. J. 385. N. Y. Laws 1889, c. 531, § 12.

² People v. Newton, (1889) 112 N. Y. 396.

⁴ People v. Gilroy, (1890) 9 N. Y. Supp. 833.

³ People v. Gilroy, (1890) 9 N. Y.

ent rails as motive power for its cars by the agency of steam from stationary engines. A mere statement of the proposition should be a sufficient answer to the claim. To open a city street for the construction of a surface railroad track or its reparation, and to open that street for the introduction of a power to operate the road, would seem to be separate and distinct things. In the first, the excavation ends with the construction. The material of the street is replaced, or, in lieu of it, some other substance which restores the surface to its unbroken condition and usefulness, and leaves all below the surface to such uses as the municipality may require. In the other case, as the record discloses, the cable requires a conduit of mason-work the necessary excavation for which, on a straight stretch of road without curves, is six feet wide and from four to five feet deep. Where there is a double track, there must be two of these trenches, and at intervals of thirty-five feet along the whole distance they must go still deeper for drainage; and where there are curves the width of the excavation must be at least from twelve to fifteen feet. At a corner the fill will be thirty feet in width, and at the engine-houses, whence the cable extends to the conduit in the street, it will be necessary to excavate the entire street from the engine room out to and beyond the track furthest from it. None of these things are required for the construction of a street surface railroad; none of them pertain even to its operation. They relate to some act or thing to be done below the surface.”¹

¹ People v. Newton, (1889) 112 N. Y. 396.

CHAPTER XXI.

POWERS OF FOREIGN CORPORATIONS.

§ 411. Introductory.

412. Restrictions.

413. Conditions.

414. Statutory powers.

415. Compliance with statutes.

§ 416. "Doing business," defined.

417. Comity.

418. Citizenship.

419. The same subject continued.

420. Eminent domain.

§ 411. Introductory.—Corporations of one State have no absolute right to transact business in other States.) (They depend for such right and power upon the comity of States.) (That comity may be extended and assent granted upon such terms and conditions as the States may see proper to impose.) They may exclude a foreign corporation from the privilege of transacting business altogether.) They may restrict its business to particular localities, or they may exact security, by requiring deposits, or otherwise, for the performance of its contracts with their citizens, and impose such taxation as is warranted by their own constitutions.¹ It is well settled that corporations of one State may exercise their faculties in another only so far, and on such terms and to such extent, as may be permitted by the latter. The question is always one of legislative intent, and not of legislative power or legal possibility.² Accordingly a corporation created by one State can transact business in another only with the consent, express or implied, of the latter. The existence of a corporation in a foreign jurisdiction is recognized, not by right, but of grace.³ In other words, the right of a corporation formed in one State to exercise its cor-

¹ Paul v. Virginia, 8 Wall. 168.

² Railroad Co. v. Harris, 12 Wall. 82; Doyle v. Continental Ins. Co., 94 U. S. 535; Morawetz on Corporations, § 513.

³ Farmers' &c. Co. v. Harrah, 47 Ind. 236; Home Ins. Co. v. Davis, 29 Mich. 238; Erie Ry. Co. v. State,

31 N. J. L. 531; s. c. 86 Am. Dec. 226; People v. Fire Assoc., 92 N. Y. 311; Western &c. Co. v. Mayer, 28 Ohio St. 521; Bank of Augusta v. Earle, 13 Pet. 519; Lafayette Ins. Co. v. French, 18 How. 404; Paul v. Virginia, 8 Wall. 168; Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566.

porate powers in another State is dependent upon the will of the latter.¹ The comity between the States in allowing foreign corporations to make and enforce contracts therein, is a voluntary act of sovereignty, and will not be extended by a State when contrary to its policy or prejudicial to its interests.² In accordance with these principles, a State has power to exclude from its territory corporations chartered by other States, and the motive of such expulsion can not be inquired into.³ A foreign corporation can not be permitted to do business that is not allowed by the laws thereof.⁴ A distinction may be made between companies of different States of the union and those of foreign countries. Therefore under

¹ *Commonwealth v. Milton*, (1851) 12 B. Mon. 212; s. c. 54 Am. Dec. 522; *Erie Ry. v. State*, (1864) 31 N. J. 531; s. c. 86 Am. Dec. 226; *Ducat v. City of Chicago*, (1868) 48 Ill. 172; s. c. 95 Am. Dec. 529; *Phoenix Ins. Co. v. Commonwealth*, (1868) 5 Bush, 68; s. c. 96 Am. Dec. 331.

² *Ducat v. City of Chicago*, (1868) 48 Ill. 172; s. c. 95 Am. Dec. 529.

³ *Morawetz on Corporations*, § 971, (2nd ed.); *People v. Fire Assoc.*, 92 N. Y. 311; *Western & C. Co. v. Mayer*, 28 Ohio St. 521; *Doyle v. Continental Ins. Co.*, 94 U. S. 535.

⁴ The laws of Illinois provide for the organization of only two kinds of fire insurance companies,—joint-stock companies and companies organized on the mutual plan. A fire insurance company, incorporated under the laws of another State, must show itself one of these two kinds before it is entitled to a license to do business in Illinois. *Mutual Fire Ins. Co. v. Surgett*, (1887) 120 Ill. 36. This case more at large was as follows: The Mutual Fire Insurance Company was organized under the laws of New York as a joint-stock company, with sufficient capital to entitle it to do business in this State, but its charter was afterwards amended by law, since which it has

been regarded in New York as a mutual company. The amendment provides that the company is authorized to receive from any number of persons subscriptions payable in cash, and give therefor receipts bearing interest, which receipt shall set forth that they are given for money received in advance for premiums, that the amounts thereof are liable for the expenses and losses of the company, that the receipts shall be received by the company only in payment for premiums of insurance, and that the company may commence business on the mutual plan when the whole amount subscribed and paid in cash shall reach \$200,000. The amendment does not, however, provide that the persons thus subscribing or lending money to the company, ostensibly for insurance, should take policies of insurance the premiums on which should equal the amount lent or subscribed to the company. And it is held that the company can not, on this plan, be said to be a corporation for insurance, organized on the mutual plan, as contemplated by the laws of Illinois, and therefore is not entitled to a foreign insurance company's license to do business in that State.

a statute requiring insurance companies, as a condition of doing business in the State, to make a certain deposit with the Michigan State treasurer, or with certain named officers of the State where the company is "organized," a British or other foreign company can not be considered as organized in another State in which it is merely licensed to do business so as to meet the requirements of the statute by a deposit made in such other State.¹

§ 412. **Restrictions.**—A State may in its discretion require a foreign corporation to comply with certain prescribed formalities, to pay taxes, licenses, and to assume obligations that may be required of it, as a condition precedent to its right to transact business within its jurisdiction.² Furthermore, it is clear that a State has power to discriminate against foreign corporations desiring to transact business within its territory, and it has been expressly decided both by the State and federal courts that a State has the right to impose upon corporations chartered by other States a tax or burden for the privilege of transacting their business therein, although no such burdens are imposed upon like corporations chartered by its own legislature.³ A State may impose upon foreign corporations the same burdens in the way of license fees, taxes and the like, that its corporations have to bear as a condition of their doing business in other jurisdictions.⁴ Accordingly

¹ *Employers' &c. Co. v. Commissioner*, (1887) 64 Mich. 614; Mich. Laws 1881, p. 279.

² *Netley v. Clark Gardner &c. Co.*, 4 Col. 369; *Goldsmith v. Home Ins. Co.*, 62 Ga. 379; *People v. Thurber*, 13 Ill. 354; *Fireman's B. Assoc. v. Lounsbury*, 21 Ill. 511; s. c. 74 Am. Dec. 775; *Cincinnati &c. Co. v. Rosenthal*, 55 Ill. 85; s. c. 8 Am. Rep. 626; *Western &c. Co. v. Lieb*, 76 Ill. 174; *Farmers' &c. Co. v. Harrah*, 47 Ind. 236; *Phoenix Ins. Co. v. Commonwealth*, 5 Bush, 68; *State v. Fosdick*, 21 La. Ann. 434; *Atty.-Gen. v. Bay State &c. Co.*, 99 Mass. 148; *Home Ins. Co. v. Davis*, 29 Mich. 238; *People v. Imlay*, 20 Barb. 68; *People*

v. Fire Assoc., 92 N. Y. 311; *Western &c. Co. v. Mayer*, 28 Ohio St. 521; *Fire Dep't v. Helfenstein*, 16 Wis. 136; *St. Clair v. Cox*, 106 U. S. 350.

³ *Angell & Ames on Corporations*, § 486; *St. Clair v. Cox*, 106 U. S. 350; *Commonwealth v. Milton*, 12 B. Mon. 212; s. c. 54 Am. Dec. 522; *Phoenix Ins. Co. v. Commonwealth*, 5 Bush, 68; *State v. Fosdick*, 21 La. Ann. 434; *Tatem v. Wright*, 23 Ill. J. 429; *Fire Dep't v. Noble*, 3 E. D. Smith, 440; *Fire Dep't v. Wright*, 3 E. D. Smith, 453; *Fire Dep't v. Helfenstein*, 16 Wis. 136.

⁴ *Goldsmith v. Home Ins. Co.*, 62 Ga. 379.

a statute has been sustained which provided that a foreign corporation should pay to the State superintendent of the insurance department in taxes and fines an amount equal to that imposed by existing or future laws of the State of its origin upon companies of the former State seeking to do business in the latter, when such amount would be greater than that required for such purposes by the then existing laws of the former. (Discrimination in taxation may be made between foreign corporations and domestic corporations of the same character.² For it is said that a tax imposed upon a corporation is not a tax upon the persons or property of corporators or stockholders. It is the artificial being, the mere legal entity which is taxed, and the tax is paid out of its funds.) (And as a foreign corporation has no status as a citizen of the State creating it, the objection that a tax imposed upon it is not uniform, can not be maintained.³) But a State can not tax a foreign corporation upon a different principle or in a different manner from that applied to her own corporations.⁴

§ 413. Conditions.—A State may impose as a condition of a foreign corporation's doing business therein that process on the corporation's agent shall be considered as service upon the corporation itself; and such a condition is neither unconstitutional nor unreasonable.⁵ "If a State permits a foreign corporation to do business within her limits, and at the same time provides that in suits against it for business done there process shall be served upon its agents, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the State are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of the process. Such conditions must not, however, encroach upon that principle of natural justice which requires notice of a suit to a party before he can be bound by it. It must be reasonable; and the service provided for should only be upon such agents as may be

¹ *People v. Fire Assoc.*, 92 N. Y. 311.

⁴ *Erie Ry. Co. v. State*, 81 N. J. 531.

² *Ducat v. City of Chicago*, (1868) 48 Ill. 172; s. c. 95 Am. Dec. 529.

⁵ *Lafayette Ins. Co. v. French*, 19 How. 404.

³ *Ducat v. City of Chicago*, (1868) 48 Ill. 172; s. c. 95 Am. Dec. 529.

properly deemed representatives of the foreign corporation."¹ It has been said that a statute requiring foreign corporations to comply with certain conditions, such as appointing an attorney, on whom process could be served, before transacting business in the State, does not apply to corporations engaged in the manufacture and sale of articles covered by letters patent.² But the contrary is the better rule.³ State courts have decided that a condition that foreign corporations shall submit themselves to the jurisdiction of the State courts, and not transfer causes to the federal courts, is valid.⁴ But by the highest federal court it has been held that a statute which enacted that a foreign corporation should not transact business in the State in which it was enacted, unless it stipulated in advance that it would not remove into the federal courts any suit which might be commenced against it in the State, was repugnant to the constitution of the United States, and void; and that an agreement entered into pursuant to such statute was of no effect,⁵ especially when it is apparent that the entire purpose of the statutes is to deprive such companies of that right.⁶

§ 414. Statutory powers.— A corporation formed in one State may be made a domestic corporation of another State, in which it has its offices and transacts its business, notwith-

¹ Justice Field in *St. Clair v. Cox*, 106 U. S. 356.

² *Grover & Co. v. Butler*, 53 Ind. 454; s. c. 21 Am. Rep. 200.

³ *Patterson v. Commonwealth*, 11 Bush, 311; s. c. 21 Am. Rep. 220, not following the *Indiana* case, which is condemned also in the note 22 Am. Rep. p. 67, as going too far, according to the cases, inasmuch as the law was a general law uniform in its operations and did not in any degree interfere with the sale or assignments of rights under letters patent.

⁴ *Home Ins. Co. v. Davis*, 29 Mich. 238, and holding that these acts are not contrary to the section of the constitution giving the United States power to regulate commerce be-

tween the States; nor to the fourteenth amendment of the United States constitution, prohibiting States from passing laws abridging the privileges of citizens of the United States, or denying to any person within the jurisdiction of the State the equal protection of its laws; and that such a statute is not unconstitutional, as interfering with the judicial power of the United States as established by the constitution and laws of the United States. *Goodrel v. Kreichbaum*, (1886) 70 Iowa, 362.

⁵ *Insurance Co. v. Morse*, 20 Wall. 445; *Doyle v. Continental Ins. Co.*, 94 U. S. 535.

⁶ *Barron v. Burnside*, (1887) 121 U. S. 186.

standing the fiction of law that a corporation dwells only in the State of its creation, and can not migrate therefrom.¹ Even the power to take land by eminent domain may be given to a foreign corporation, and a corporation, by consent of the legislature, may take this power as a *quasi* successor of another corporation to which it was originally granted.² Where, however, a State statute grants to a foreign corporation a permit to transact business in the State, no conditions can be imposed by the State which are repugnant to the constitution and laws of the United States.³ In the case of river navigation companies it has been held that an article of a State constitution which provides that no foreign corporation shall do any business in this State without having one or more known places of business, and an authorized agent or agents in the State upon whom process can be served, is null and void, being an attempt on the part of the State to interpose a restriction on navigation, and therefore in conflict with the provisions of an act of congress passed in pursuance of a clear authority under the constitution of the United States.⁴ Concerning the provision in a constitution that "no foreign corporation shall do any business in this State, without having at least one known place of business and an authorized agent or agents therein," it has been said that it is just as much a police regulation as a law forbidding vagrancy.⁵ Where general laws exist enabling foreign corporations to do business in a State they must be complied with as to any prerequisites to engaging in business therein. And the foreign corporation must comply with

¹ *Young v. South Tredegar Iron Co.*, (1886) 85 Tenn. 189; s. c. 4 Am. St. Rep. 752. The supreme court of the United States in the case of *Railroad v. Harris*, 12 Wall. 82, say: "Nor do we see any reason why one State may not make a corporation of another State, as there organized and conducted, a corporation of its own *quoad hoc* any property within its jurisdiction. That this may be done was distinctly held in *Ohio & C. R. Co. v. Wheeler*, 1 Black, 297."

² *Abbott v. New York & C. R. Co.*, (1888) 145 Mass. 450.

³ *Barron v. Burnside*, (1887) 121 U. S. 186; *Lafayette Ins. Co. v. French*, 18 How. 404; *Ducat v. Chicago*, 10 Wall. 410; *Home Ins. Co. v. Morse*, 20 Wall. 445, 456; *St. Clair v. Cox*, 106 U. S. 350; *Philadelphia Fire Assoc. v. New York*, 119 U. S. 110, 120.

⁴ *New Orleans & C. Co. v. James*, (1887) 32 Fed. Rep. 21; *Const. La. art. 236*.

⁵ *Dudley v. Collier*, (1889) 87 Ala. 431; s. c. 13 Am. St. Rep. 55; *American & C. Co. v. Western & C. Co.*, 67 Ala. 26; *Ala. Const. art. xiv, § 4*.

all the laws of the State in which it would do business applicable to the case.¹ Accordingly the stock of a corporation formed in another State which has become a domestic corporation of Tennessee by complying with the law, having its general office, officers, directors, books, seal, plant and property in that State, is subject to attachment in Tennessee, although the non-resident owner has the certificates in his possession beyond the limits of her jurisdiction.² Under a statute requiring a foreign corporation doing business in that territory to file with the secretary of the territory, and with the recorder of the county in which it is carrying on business, a copy of its charter or certificate of incorporation, duly authenticated, a copy certified under the seal of the Secretary of State of the State of the incorporation, as being a correct copy of the original on file in his office, is sufficient.³ But a corporation can not take advantage of an act for granting privileges within a State, when the business of the corporation is not that contemplated by the act.⁴

¹ Gen. Laws Minn. 1889, ch. 225, provides that no corporations shall be created or organized under the laws of the State unless the incorporators shall at or before filing the articles of incorporation pay into the State treasury the sum of \$50 for the first \$50,000, or fraction thereof, of capital stock, etc. And the court held that the provision applied to an Iowa railroad company who accepted the provisions of Gen. Laws 1877, ch. 14, that any Iowa railroad company might extend its lines into Minnesota, and have all the privileges of State companies, provided they filed copies of their articles with the Secretary of State of Minnesota, and complied with the laws as to filing and recording such articles. *State v. Sioux City & Co. R. Co.*, (Minn. 1890) 44 N. W. Rep. 1032.

² *Young v. South Tredegar Iron Co.*, (1886) 85 Tenn. 189; s. c. 4 Am. St. Rep. 752; Tenn. Laws, 1877, ch. 31; *Fitzsimmons v. City Fire Ins. Co.*, (1864) 18 Wis. 234; s. c. 86 Am. Dec. 761.

³ *Hammer v. Garfield & Co.*, (1889) 120 U. S. 291.

⁴ A Michigan act to revise the laws providing for the incorporation of companies for mining iron and other ores and minerals, and to fix the duties and liabilities of such corporations, provides that "foreign corporations, organized for the purposes contemplated by this act, upon filing copies of their charter or articles," etc., with the Secretary of State and county clerk, may enjoy all the privileges, and be subject to all the restrictions, of corporations existing under said act. *Relator*, a foreign corporation, was organized, not only for mining, but also, and principally, for colonizing and general trading purposes, with power to organize other corporations. And it is held that the Secretary of State will not be compelled to file the relator's articles of incorporation, as it exists for purposes not contemplated by the act. *Isle Royale & Co. v. Secretary of State*, (1889) 76 Mich.

§ 415. **Compliance with statutes.**—Non-compliance with the conditions of doing business in a State by a foreign corporation does not render its contracts therein void.¹ And under the constitution of Alabama, providing that no “foreign corporation shall do any business in this State without having at least one known place of business, and an authorized agent,” though the complainant, a trust company of New York, does business in Alabama without having a known place of business or authorized agent, its contracts made in the State, and relating to Alabama property, are not void, but voidable, and a plea in bar to complainant’s foreclosure suit, based on such constitutional provision, is insufficient.² These constitutional provisions do not prohibit a single contract of sale by a foreign corporation to a citizen of the State and a maintenance of an action in the State by the corporation for a breach of the contract.³ But on the other hand it has been held that a broker who, as agent for a foreign corporation which has not complied with the act making it unlawful for a foreign corporation to do business in the State without first filing in the office of the Secretary of State a statement in writing, designating at least one known place of business in the State and an authorized agent thereat, negotiates a loan from the corporation, can not recover compensation for his services from the borrower.⁴ And similar statutes in other States regulating the doing of business by foreign corporations have been frequently construed in accordance with these views.⁵ The

162, construing How. Mich. Stat. ch. 123, § 23.

¹ As where the law provides that a corporation duly incorporated under the laws of any other State may transact business in this State upon complying with the requirements of that section, “but not otherwise;” and further provides that a corporation doing business in the State before complying with such requirements shall be subject to a fine, the penalty prescribed therein is exclusive of all others. *Toledo & Co. v. Thomas*, (W. Va. 1890) 11 S. E. Rep. 37.

² *American &c. Co. v. East &c. R. Co.*, (1889) 37 Fed. Rep. 242; Const. Ala. art. xiv, § 4.

³ *Cooper Manuf. Co. v. Ferguson*, (1885) 113 U. S. 727.

⁴ *Dudley v. Collier*, (1889) 87 Ala. 431; s. c. 13 Am. St. Rep. 55.

⁵ *Dudley v. Collier*, (1888) 87 Ala. 431; s. c. 13 Am. St. Rep. 55, citing *Cincinnati Assur. Co. v. Rosenthal*, 55 Ill. 85; *Ætna Ins. Co. v. Harvey*, 11 Wis. 394; *Hoffman v. Banks*, 41 Ind. 1; *Union &c. Co. v. Thomas*, 46 Ind. 44; *Bank v. Page*, 6 Oregon, 431; *In re Comstock*, 3 Sawy. 218; *Semple v. Bank*, 5 Ind. 88; *Williams v.*

failure, however, of a foreign corporation to comply with the law providing that all foreign corporations, before doing any business within the territory, shall file with the secretary thereof, and the recorder of the county wherein they intend to transact business, a copy of their charter, and a statement, does not preclude it from suing to recover taxes paid under protest, and alleged to have been illegal, as such action is not based upon any act or contract of plaintiff in the conduct of its business.¹ Nor will conveyances to such corporation be avoided so as to be subject to collateral attack.² A bill in equity by a foreign corporation, to have a loan evidenced by notes secured by a mortgage declared a lien on land, which shows on its face that the loan was made by complainant in the State, is demurrable, unless it alleges that, when the loan was made, complainants had complied with a constitutional provision requiring a foreign corporation, before doing business in the State, to file in the office of the Secretary of State an instrument in writing designating at least one known place of business in the State, and an authorized agent or agents thereat.³ Compliance with the statute prohibiting a foreign

Cheney, 3 Gray, 215; Jones v. Smith, 3 Gray, 500; 2 Morawetz on Corp., (2nd ed.) §§ 661-665; Thorne v. Travellers' Ins. Co., 80 Pa. St. 15.

¹ Powder River Cattle Co. v. Custer County, (Mont. 1889) 22 Pacif. Rep. 383; Comp. Stat. Mont. div. 5, § 442.

² Const. Colo. art. xv, § 10, declares that no foreign corporation shall do business in the State without a known place of business, and agent in the State on whom process may be served. Gen. Stat. Colo. 1883, §§ 260-262, provides that, before any foreign corporation shall do business in the State, it shall file with certain officers a certificate of its place of business, and the name of its agent in the State; that "no foreign or domestic corporation established or maintained in any way for pecuniary profit of its stockholders or members shall purchase or hold real estate in this State, except as provided

for in this act;" that every foreign corporation shall file with the Secretary of State a copy of its charter, and of the law under which it was incorporated; and that failure to comply with the act "shall render each and every officer, agent, and stockholder of any such corporation jointly and severally liable on any and all contracts of such company made within the State during the time that such corporation is so in default." But it is held that the failure of a foreign corporation to comply with the conditions entitling it to do business in the State does not render a conveyance to it void, so that it may be attacked collaterally by a private person. Fritts v. Palmer, (1889) 122 U. S. 282.

³ Christian v. American &c. Co., (Ala. 1890) 7 So. Rep. 427; Const. Ala. art. xiv, § 4; Laws Ala. 1887, Feb. 28.

corporation to hold land can not be avoided by buying the stock of a domestic company having the power desired.¹

§ 416. "Doing business" defined.—A law providing that the agents of a foreign corporation, before entering on their business as such, shall file evidence of authority with the clerks of counties where they propose to do business, does not apply to persons engaged in appointing agents to do the business of the corporation.² Nor is soliciting and receiving subscriptions for a newspaper published by a corporation in one State, "doing business" in this State within the meaning of the constitution requiring a foreign corporation in such a case to have a known place of business there.³ So where a State constitution prohibits the taxation of callings and pursuits for State purposes, stove range agents selling the goods of a foreign corporation within the State can not be taxed for State purposes.⁴ And where defendants living in Pennsylvania, agreed with a Maryland corporation, of which they were members, to can their fruit, and hold it subject to the company's order; and plaintiff bought fruit so canned from the company; it was held that defendants were estopped to dispute plaintiff's title on the ground that the company had not complied with the law regulating foreign corporations; the agreement between defendants and the company, and the acts in pursuance of it, were not transacting business in the

¹ Under the Pennsylvania Act of April 2, 1855, which prohibits any corporation not incorporated under the laws of the State, from holding real estate within the commonwealth, "directly in the corporate name, or by or through any trustee or other device whatsoever," unless specially authorized by law, a foreign corporation can not, by purchasing the charter of a mining company, vesting the title to lands in the corporate name thereof, and procuring the issue to itself, of the stock of such mining company, become the owner of lands in the State which it is not specially authorized

to hold; and if, by such means, a foreign corporation does acquire title to lands in the State, the lands are liable to escheat by proceedings in *quo warranto* under the Act of April 26, 1855. *Commonwealth v. New York & C. R. Co.*, (1887) 114 Pa. St. 346.

² *Morgan v. White*, (1885) 101 Ind. 413; *Ind. Rev. Stat.* 1881, §§ 3022, 3023.

³ *Beard v. Union & American Publishing Co.*, (1884) 71 Ala. 60.

⁴ *Hynes v. Briggs*, (1889) 41 Fed. Rep. 468; *s. c.* 7 Ry. & Corp. L. J. 388.

State, within the law regulating foreign corporations.¹ The prosecution or defense of an action is not the doing of business in the State, within the meaning of such acts.²

§ 417. **Comity.**—Foreign corporations are, however, by the comity of nations permitted to make contracts in other States and to establish agencies and carry on business there, unless they are excluded from so doing, or unless such permission is against the policy or interest of such States.³ And generally corporations may enter into contracts outside of the State in which they are formed.⁴ But, of course, comity can not extend to the point of granting to a foreign corporation privileges which its charter does not permit it to exercise.⁵ A corporation organized for the purpose of supplying cities with water, though not especially authorized to do business outside the State, has, by inference from its object, the right so to do.⁶ So a corporation may hold and deal in land in another State.⁷ Especially may it acquire land in another State in satisfaction of a debt due to it.⁸ And it may buy at an execution sale on

¹ Kilgore v. Smith, (1888) 122 Pa. St. 48.

² Christian v. American &c. Co., (Ala. 1890) 7 So. Rep. 427.

³ Blair v. Perpetual Ins. Co., 10 Mo. 559; s. c. 47 Am. Dec. 129; Williams v. Creswell, 51 Miss. 817; Newbury &c. Co. v. Weare, 27 Ohio St. 343; Ohio &c. Co. v. Merchants' &c. Co., 11 Humph. 7; s. c. 53 Am. Dec. 742; Alward v. Holmes, (1882) 10 Abb. N. C. 96.

⁴ Miller v. Ewer, (1847) 27 Me. 509; s. c. 46 Am. Dec. 619; Blair v. Perpetual Ins. Co., (1847) 10 Mo. 559; s. c. 47 Am. Dec. 129. In the Maine case it was said: "If the artificial being called the Bluehill Granite Company may be considered as having existence and active life in this State by proof of its acts within her limits, it will still be true that it can not have existence without her limits and of course can not make choice of officers there. It may maintain a suit without those limits, but that

does not imply its existence or presence there. It may also contract without those limits. Being within them, it may, acting *per se*, by vote transmitted elsewhere, propose a contract or accept one previously offered. And it may, by an agent or agents duly constituted, act and contract beyond those limits. But it can neither exist, nor act *per se*, without them, except by the existence of its officers or agents duly elected or appointed within them."

⁵ And in applying for privileges it must show that it has power to exercise them. Diamond Match Co. v. Powers, (1884) 51 Mich. 145.

⁶ Dodge v. Council Bluffs, 57 Iowa, 560.

⁷ Though doing no business in the State where it was organized. New Hampshire Land Co. v. Tilton, (1884) 19 Fed. Rep. 73.

⁸ Columbus Buggy Co. v. Graves, (1884) 108 Ill. 459.

judgments in its favor.¹ And it has been decided that a mortgage on Illinois lands taken by the United States Mortgage Company, a foreign corporation created for the business of lending money, is valid; the general incorporation law of Illinois providing that no foreign or domestic corporation established for profit shall purchase or hold real estate in the State, not preventing corporations from taking mortgages on real estate as security. The provision that foreign corporations doing business in the State shall have no greater powers than corporations of like character organized under the general laws of the State does not prevent the mortgage company from doing business in Illinois, because, although no provision is made by Illinois laws under which companies can be formed for the purpose of lending money, it is not to be inferred from that fact, nor from the language of the incorporation law,—providing that “corporations may be formed, in the manner provided by this act, for any lawful purpose, except banking, insurance, real estate brokerage, the operation of railroads, and the business of loaning money,”—that corporations should not be formed there for the business of lending money.² The federal law prohibiting Territorial legislatures from authorizing the organization of corporations except under general laws, does not preclude a corporation organized under a special charter granted by a State from doing business in a Territory.³

§ 418. **Citizenship.**—A corporation dwells only in the State of its creation and can not migrate therefrom.⁴ As a corporation exists only in contemplation of law, and by force of law, it can have no legal existence beyond the State or sovereignty by which it is created.⁵ It does not, by purchasing and operating property in another State under enabling

¹ *Elston v. Piggott*, (1884) 98 Ind. 14.

² *Stevens v. Pratt*, (1882) 101 Ill. 206, Walker, J., dissenting.

³ *Wells v. Northern Pacific Ry. Co.*, 23 Fed. Rep. 469; U. S. Rev. Stat. § 1889.

⁴ *Clarke v. Bank of Mississippi*, (1850) 10 Ark. 516; s. c. 52 Am. Dec. 248; *Ohio &c. Co. v. Merchants' &c. Co.*, (1850) 11 Humph. 1; s. c. 53 Am. Dec. 742; *Aspinwall v. Ohio &c. R.*

Co., (1863) 29 Ind. 492; s. c. 83 Am. Dec. 329; *County of Allegheny v. Cleveland &c. R. Co.*, (1865) 51 Pa. St. 228; s. c. 88 Am. Dec. 579; *Baltimore &c. R. Co. v. Glenn*, (1868) 28 Md. 287; s. c. 92 Am. Dec. 688; *Phoenix Ins. Co. v. Commonwealth*, (1868) 5 Bush, 68; s. c. 96 Am. Dec. 331.

⁵ *Reece v. Newport News &c. Co.*, (1889) 32 W. Va. 164.

acts of that State, become a domestic corporation therein.¹ But where a railroad corporation chartered in Connecticut bought the franchises and property of a railroad corporation created under the laws of Connecticut and Rhode Island, and the Rhode Island legislature ratified the sale and authorized the former company to exercise the rights thus acquired, it was held that the company thus became the successor of the former company, and a Rhode Island corporation.² And where a corporation organized in Alabama obtained an act from the Mississippi legislature authorizing it to establish one or more departments under the same name in that State, but not until citizens of that State had subscribed for a certain part of capital stock, when it should be regarded as a home company, and have all the privileges of such companies, this act was not a mere license for the original corporation to do business in Mississippi, but created a new corporation.³ So, a corporation formed by consolidation of corporations of two States, legislation of both States authorizing the consolidation, is a corporation of each State.⁴ And, conversely, a corporation, by the same name, may be chartered by two States, clothed

¹ *Wilkinson v. Delaware, Lackawana &c. R. Co.*, 22 Fed. Rep. 353. So a Texas law, recognizing the existence of a corporation organized under Kansas law, and conferring on it within Texas the same rights and powers as were granted it by Kansas, within its territory, but not purporting to create a new corporate body, is merely an enabling act, and does not make it a corporation or citizen of Texas. *Missouri &c. Ry. Co. v. Texas &c. Ry. Co.*, 4 Woods C. Ct. 360. And the Georgia charter of the Selma, Rome & Dalton Railroad, section 6, empowering the company to lease or sell its property within Georgia to any railroad company authorized by law of another State to purchase it, said purchaser to have "all the rights and privileges of this company," does not thereupon make the purchaser a corporation of Geor-

gia. *Morgan v. East Tennessee &c. R. Co.*, 4 Woods C. Ct. 523. And a railroad company incorporated in Maryland to build a road there which afterwards obtained a special charter in Delaware to extend its road in that State, but did nothing under that act, was held not to have become a Delaware corporation. *Philadelphia &c. R. Co. v. Kent County R. Co.*, 5 Del. 127.

² *Clarke v. Barnard*, 108 U. S. 436.

³ *Grangers' Life & Health Ins. Co. v. Kamper*, 73 Ala. 325.

⁴ *Burger v. Grand Rapids & Indiana R. R. Co.*, (1885) 22 Fed. Rep. 561; *Colglazier v. Louisville, New Albany &c. Ry. Co.*, (1885) 22 Fed. Rep. 568; *State v. Chicago, B. & Q. R. Co.*, (1888) 25 Neb. 156; *State v. Missouri Pac. R. Co.*, (1888) 25 Neb. 164; *State v. Chicago, St. P. M. & O. R. Co.*, (1888) 25 Neb. 165.

with the same powers, and intended to accomplish the same objects, and exercise the same powers and duties in both States, but it will be two distinct corporations,—one in each State,—with only such corporate powers in each State as are conferred by its creation in that State.¹ (For jurisdictional purposes a corporation is a citizen of the State creating it, or within whose jurisdiction it has its domicile.²) So, a corporation is a citizen in the sense the term is used in that portion of the constitution conferring jurisdiction on the United States courts in cases between citizens of different States.³) A foreign corporation, with an agent and office for the transaction of business in another State, has a legal residence where such office and agent are.⁴ A complaint alleging that “the plaintiff is, and at the times hereinafter stated was, a banking association created by and organized under the laws of the State of New York, with its banking-house located, and principally transacting business, at the city of New York,” sufficiently shows that plaintiff is a domestic corporation.⁵

§ 419. The same subject continued.—It has been uniformly held that a corporation is not a citizen within the clause of the constitution declaring that the citizens of each State shall be entitled to all privileges and immunities of the citizens of the several States.⁶) The privileges secured to corporations are

¹ *Reece v. Newport News &c. Co.*, (1889) 32 W. Va. 164.

² See 16 Alb. L. J. 344, article by S. T. Spear, considering the citizenship of corporations in relation to suits in the federal courts, and discussing the following cases concurring in the doctrine in the text: *Bank of Augusta v. Earle*, 13 Pet. 519; *Paul v. Virginia*, 8 Wall. 168; *Bank of United States v. Deveaux*, 5 Cranch, 61; *Hope Ins. Co. v. Boardman*, 5 Cranch, 57; *Louisville &c. R. Co. v. Leston*, 2 How. 497; *Marshall v. Baltimore &c. R. Co.*, 16 How. 314; *Covington &c. Co. v. Shepherd*, 20 How. 227; *Ohio &c. R. Co. v. Wheeler*, 1 Black, 286; *Cowles v. Mercer Co.*, 7 Wall. 118; *Railway*

Co. v. Whitton, 13 Wall. 270; *Gaines v. Fuentes*, 2 Otto, 10; *Ins. Co. v. Morse*, 20 Wall. 445.

³ *Ducat v. City of Chicago*, (1868) 48 Ill. 172; s. c. 95 Am. Dec. 529.

⁴ *Harding v. Chicago & Alton R. Co.*, (1885) 80 Mo. 659.

⁵ And therefore complies with Code Civil Proc. N. Y. § 1775, requiring a complaint by a corporation to state whether it is a domestic or foreign corporation, etc. *Columbia Bank v. Jackson*, (1889) 4 N. Y. Supl. 433.

⁶ *Ducat v. City of Chicago*, (1868) 48 Ill. 172; s. c. 95 Am. Dec. 529; *Cincinnati &c. Co. v. Rosenthal*, 55 Ill. 85; s. c. 8 Am. Rep. 626; *Farmers' &c. Co. v. Harrah*, 47 Ind. 326; *Phoenix Ins. Co. v. Common-*

in the nature of special privileges, which, conferred upon individuals in their own State, are not secured to them in other States by this constitutional provision.¹ To the same purport, it has been said that the right of individuals to be a corporation and to act in a corporate capacity is a peculiar privilege, the creation of local law, and can not by the mere force of that law exist or be exercised beyond the territorial limits of the State which enacts it.² A reason for this rule is, that otherwise the policy, interest, and desires of the weaker States might be overwhelmed by their more potent neighbors. A favorite policy of Kentucky and some other States against tying up lands in perpetuity might be revolutionized by the powers and capacities of the corporations of neighboring States, to purchase and perpetually hold real estate; and this is but one of the numerous phases in which her cherished policy on various subjects might be overwhelmed by the corporations of her neighbors, if they were to be regarded as citizens and within the protection of the constitution and thereby beyond the discriminating control of the State legislature.³

§ 420. Eminent domain.— A foreign corporation can not condemn lands under the general railroad law of a State. It

wealth, 5 Bush, 68; *Home Ins. Co. v. Davis*, 29 Mich. 238; *People v. Imlay*, 20 Barb. 68; *Western &c. Co. v. Mayer*, 28 Ohio St. 521; *Wheeden v. Camden &c. Co.*, 2 Phila. 23; *Bank of Augusta v. Earle*, 13 Pet. 519. Taney, C. J., in delivering the opinion of the court in *Lafayette Ins. Co. v. French*, 18 How. 404, said: "No one, we presume, ever supposed that an artificial being, created by an act of incorporation, could be a citizen of a State in the sense in which that word is used in the constitution of the United States."

¹ *Paul v. Virginia*, 8 Wall. 181, where Field, J., discussing this subject, said: "Now, a grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless other-

wise specially provided) from individual liability. . . Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely. They may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

² *Commonwealth v. Milton*, 12 B. Mon. 212; s. c. 54 Am. Dec. 522.

³ *Phoenix Ins. Co. v. Commonwealth*, (1868) 5 Bush, 68.

must obtain special legislative authority.¹ Some constitutions provide that no foreign corporation may condemn land nor appropriate private property.² So foreign railways can not exercise the right of eminent domain nor acquire a right of way nor hold real estate in Nebraska until duly incorporated by that State.³ Under that constitution a foreign corporation, which has not become a corporation under the laws of Nebraska, can not avail itself of the services of another corporation to acquire a right of way, and it may be enjoined from appropriating property for that purpose.⁴ In that State only railroad companies organized under its laws can condemn a right of way across lands owned by the State.⁵ In New York foreign corporations, however, are entitled to the benefit of an act which provides for the acquisition of additional lands found to be necessary for the operation of a railway subsequently to its construction.⁶ And in a late case it is held that they are entitled to the benefit of an act which provides that "if at any time after the construction of any railroad operated by steam, by any company now existing, or that may hereafter be created, such company, or any company owning, operating, or leasing such railroad, or any mortgagee in possession of such railroad, or person appointed as receiver of any such railroad, and in the possession of and operating the same, shall require, for the purposes of its incorporation, or for the purpose of running or operating any railroad so owned, any real estate in addition to what has been already required for the purposes of such railroad, the necessary lands may be acquired in the manner therein provided."⁷

¹ *Holbert v. St. Louis &c. R. Co.*,
45 Iowa, 23.

² Ark. Const. (1874) art. xii, § 11.

³ Neb. Const. (1875) art. xi, § 8.

⁴ *Koenig v. Chicago, B. & Q. R. Co.*, (Neb. 1889) 43 N. W. Rep. 423.

⁵ *State v. Scott*, (Neb. 1888) 36 N. W. Rep. 121; Comp. Stat. Neb. 1887, ch. 72, art. 11.

⁶ *In re Marks*, (1887) 6 N. Y. Supl. 105, construing N. Y. Laws of 1850, ch. 140, as amended by N. Y. Laws of 1881, ch. 649.

⁷ *In re Marks*, (1889) 6 N. Y. Supl. 105; N. Y. Laws of 1881, ch. 649, amending N. Y. Act of April 2, 1850.

CHAPTER XXII.

ULTRA VIRES ACTS.

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| <p>§ 421. Introductory.</p> <p>422. <i>Ultra vires</i> as a defense.</p> <p>423. Defense by a corporation which has received benefits.</p> <p>424. Defense against a corporation which has given benefits.</p> <p>425. <i>Ultra vires</i> contracts executed.</p> <p>426. <i>Ultra vires</i> contracts executory.</p> <p>427. Acts <i>ultra vires</i> because of a particular purpose.</p> <p>428. Liability of corporations for <i>ultra vires</i> torts.</p> <p>429. The right to restrain <i>ultra vires</i> acts.</p> | <p>§ 430. A single stockholder may restrain <i>ultra vires</i> acts.</p> <p>431. Acquiescence in <i>ultra vires</i> acts.</p> <p>432. Ratification of <i>ultra vires</i> acts.</p> <p>433. Estoppel if <i>ultra vires</i> contract executed.</p> <p>434. Right of the State in case of <i>ultra vires</i> acts.</p> <p>435. Forfeiture of franchise.</p> <p>436. The remedies for <i>ultra vires</i> acts.</p> <p>437. When the minority can not have recourse to the courts.</p> <p>438. Illegal corporate acts.</p> <p>439. The same subject continued.</p> |
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§ 421. Introductory.— *Ultra vires* is a term used to express the action of a corporation which is beyond the powers conferred upon it by its charter, or the statutes under which it is instituted; and the strict doctrine relating to it is, that all acts of the corporation not within the powers conferred upon it or reasonably implied from its charter, are null and void.¹ The English doctrine may be summarized thus: Corporations are created for fixed purposes, with certain specified powers. It is deemed to be public policy to keep them strictly within the bounds so defined. There is an implied prohibition to go beyond such limits, and all persons dealing with a corporation are charged with notice of the limitations upon its authority. Therefore, every contract of a corporation, or its agents, which exceeds the powers of the corporation violates this implied prohibition, and contravenes such public policy, and is illegal and void. Consequently, as to such contracts there can be no ratification or estoppel.² This doctrine has

¹ G. W. Field in 13 Am. L. Rev. East Anglian R. Co. v. Eastern Counties R. Co., 11 C. B. 775; McGregor 632.

² J. C. Harper in 12 Cent. L. J. 386; v. Deal &c. R. Co., 18 Q. B. 618;

been sustained by the argument that corporations being ideal and imaginary beings, created by the sovereign authority, should be subject to and limited by the will of the sovereign, as expressed in the charters or acts creating them, or the provisions of the general laws under which they are instituted; that every person dealing with them is presumed to have notice of the public acts and general laws, and hence of the powers conferred thereby upon them; and that, having such notice, no one should be allowed to enforce the performance of a contract made with them in relation to matters not authorized by such acts or general laws. It has been further maintained that as by creating a private corporation a part of the sovereign power of the State has been conferred upon it, and that as the contract thereby entered into between the State and the corporation is irrevocable, any power exercised on the part of the corporation, beyond what has been conferred, should be ignored by courts, as it would be an infringement upon the remaining or reserved rights of the State, which might otherwise be indefinitely extended, and the recognition of such acts would therefore be dangerous to State sovereignty and against public policy.¹ Again it has been said that a recognition of *ultra vires* acts, as valid, would be against public policy, for the reason that the assets and income of the corporation might be expended in unauthorized undertakings and speculations, and the corporation thereby prevented from performing its part of the contract with the State; and because the non-assenting stockholders and creditors of the corporation might thereby suffer loss, against which they should be protected.² But it is submitted that, by the weight of modern authority, there is no implied prohibition of, nor is public policy violated by, corporate acts simply *ultra vires*, and therefore they are not illegal, but merely voidable.³

Leake, Contracts, 582; 5 Am. L. Rev. 272, 282, article by O. W. Holmes, Jr.

¹ G. W. Field in 13 Am. L. Rev. 632.

² G. W. Field in 13 Am. L. Rev. 632.

³ This is the conclusion of a writer, Mr. J. C. Harper, in 12 Cent. L. J. 387, who cites in support of the doc-

trine many cases announcing exceptions to the strict rule of *ultra vires*. He further says the case of Franklin Co. v. Lewiston Sav. Bank, 68 Me. 43, decided in 1877, adheres to the old rule, and is the only recent case that he has been able to find that does, and that upon the facts was an extreme case. There the

§ 422. *Ultra vires* as a defense.—When acts of corporations are spoken of as *ultra vires*, it is not intended that they are unlawful or even such as the corporation can not perform, but merely those which are not within the powers conferred upon the corporation by the act of its creation, and are in violation of the trust reposed in the managing board of the shareholders, that the affairs shall be managed and the funds applied solely for carrying out the objects for which the corporation was created.¹ Whether a contract as originally made was *ultra vires* is not a very important inquiry upon suit brought upon the contract. If it was, the State under whose sovereignty the corporation dwells and by whose act and favor it exists; has no interest in arresting its action for the recovery of moneys equitably due upon a contract fully executed and a work fully accomplished, whatever may be its right to annul its charter. The shareholders, whose confidence has been abused and whose funds have been diverted from their proper use, have a direct interest in reclaiming and restoring to proper custody and applying to legitimate uses the funds which have been diverted and improperly used for purposes *dehors* the legitimate business of the corporation. But the plea of *ultra vires* should not as a general rule prevail, whether interposed for or against a corporation, when it would not advance justice, but on the contrary would accomplish a legal wrong.² In view of the inroad of exceptions to the rule, it has become practically true that the theory of *ultra vires* based upon the limited capacities of corporations has given way to a more modern one which rests the doctrine on illegality.³ In the

trustees of a savings society, although at the time having no funds for investment, subscribed for fifty thousand dollars of stock in a manufacturing company. The trustees not being able to pay, their treasurer, who held the same position in the manufacturing company also, paid the money to himself as treasurer of the latter, and took therefor the notes of the savings society, secured by the stock, which was issued directly to the manufacturing company as collateral. The savings society received no benefit whatever from the stock.

Suit being brought upon the notes, the supreme court held the contract *ultra vires* and therefore illegal and void.

¹ *Whitney Arms Co. v. Barlow*, (1875) 63 N. Y. 68; *Earl of Shaftsbury v. North Staffordshire R. Co.*, L. R. 1 Eq. 593; *Taylor v. Chichester &c. R. Co.*, L. R. 2 Exch. 356; *Bissell v. Michigan &c. R. Co.*, 22 N. Y. 258.

² *Whitney Arms Co. v. Barlow*, (1875) 63 N. Y. 69, *per Allen, J.*

³ *G. H. Wald* in 6 Cent. L. J. 5, citing *Att'y-Gen. v. Great Northern Ry. Co.*, 6 Jur. N. S. 1006; *McGregor*

absence of proof showing a want of authority on the part of a corporation in making a contract, or of a violation of its charter, a claim that the contract is *ultra vires* will not be upheld; every presumption is to the contrary.¹ The defense that bonds issued by a corporation are invalid under a constitution prohibiting the increase of the bonded debt of a corporation without the consent of the majority of the stockholders in value, should be specially pleaded.²

§ 423. Defense by a corporation which has received benefits — A corporation can not retain property acquired under a transaction *ultra vires*, and at the same time repudiate its obligations under the same transaction.³ And if a contract made by it is not in violation of the terms of the charter of the corporation or of any statute prohibiting it, the corporation is liable on the contract.⁴ And a corporation, like a natural person, may be compelled to account for benefits received from a transaction, even if it be one not enforceable by rea-

v. Dover &c. Ry. Co., 18 Q. B. 618; *Taylor v. Chichester &c. Ry. Co.*, L. R. 2 Ex. 356. It is thus stated by Blackburn, J., in *Riche v. Ashbury Ry. Car Co.*, L. R. 9 Exch. 244, at p. 262: "I do not entertain any doubt that if on the true construction of any statute creating a corporation, it appears to be the intention of the legislature, express or implied, that the corporation shall not enter into a particular contract, every court, whether of law or equity, is bound to treat a contract entered into, contrary to the enactment, as *illegal* and therefore wholly void, and can not be ratified. The test then is, not, did the legislature expressly enable the corporation to make the particular contract, but has it prohibited it, and every act not prohibited by the statute stands."

¹ *Rider Life Raft Co. v. Roach*, 97 N. Y. 378.

² *German Sav. Inst. v. Jacoby*, (Mo. 1889) 11 S. W. Rep. 256; Mo. Const. art. xii, § 8.

³ *Memphis & Little Rock R. Co. v. Dow*, 19 Fed. Rep. 388; *National Bank v. Matthews*, 98 U. S. 621; *Stewart v. National Bank*, 2 Abb. U. S. 424; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; s. c. 20 Am. Rep. 504; *Bissell v. Michigan &c. R. Co.*, 22 N. Y. 264; *Tracy v. Talmage*, 14 N. Y. 162; s. c. 67 Am. Dec. 132; *Parish v. Wheeler*, 22 N. Y. 494; *De Graff v. American &c. Co.*, 21 N. Y. 124; *Taylor County v. Baltimore &c. R. Co.*, (1888) 25 Fed. Rep. 161; s. c. 4 Ry. & Corp. L. J. 10; *Louisville &c. Ry. Co. v. Flannagan*, (1888) 113 Ind. 488; *Durst v. Gale*, 83 Ill. 136; *Hertzo v. San Francisco*, 33 Cal. 134; *Connecticut River Savings Bank v. Fiske*, 60 N. H. 363; *Eastern Counties Ry. Co. v. Hawkes*, 5 H. L. Cas. 331. *Cf. Illinois Central R. Co. v. Thompson*, 116 Ill. 159.

⁴ *State Board of Agriculture v. Citizens' Street Ry. Co.*, 47 Ind. 407; s. c. 17 Am. Rep. 702; *Hitchcock v. Galveston*, 96 U. S. 311.

son of the fact that its agents had no right to make it, it being neither illegal nor immoral.¹ To relieve injustice and hardship the doctrine seems to have been introduced, that although a contract may be void as *ultra vires*, still a recovery may be had of a corporation for money or property received on such void contract, on an implied agreement to return the property or other consideration received, or pay for the same so much as it may reasonably be worth;² and that this is so even where no fraud was intended or committed.³ In other words when a corporation has repudiated a contract as *ultra vires* it must restore to the other party whatever it may have obtained from him;⁴ unless the thing acquired has become so blended with the corporate property that it can not be rendered up without infringing the rights of persons who have never assented to the contract nor in any way acquiesced in it.⁵ Under the rule in equity that a corporation is accountable for benefits which it has received under a transaction *ultra vires*, it was held that the court, while setting aside as *ultra vires* a contract, should compel an account for the benefit had, and this, not on the basis of bare reimbursement, but of a fair com-

¹ *Manville v. Belden Mining Co.*, 110; *Silver Lake Bank v. North*, 4 17 Fed. Rep. 425.

² "*Ultra Vires*," by G. W. Field, 13 Am. Rev. 647; *Allegheny City v. Clarkson*, 14 Pa. St. 81; *Dill v. Wareham*, 7 Metc. 438; *McCracken v. San Francisco*, 16 Cal. 571; *East London &c. Ry. Co. v. Bailey*, 4 Bing. 283; *Mayor v. Charlton*, 6 M. & W. 815; *Paine v. Strand Union*, 8 Q. B. 326; *Curtis v. Leavitt*, 15 N. Y. 9; *Moss v. Rossie Min. Co.*, 5 Hill, 187; *Peterson v. Mayor*, 17 N. Y. 449; *Hooker v. Eagle Bank*, 30 N. Y. 83; *Steamboat Co. v. McCutcheon*, 13 Pa. St. 13; *Hague v. City of Philadelphia*, 48 Pa. St. 527; *City of Baltimore v. Reynolds*, 20 Md. 1; *Richard v. Warren Co.*, 31 Md. 381; *Zoetman v. San Francisco*, 20 Cal. 96; *Argenti v. City of San Francisco*, 16 Cal. 255; *Steam Nav. Co. v. Wood*, 17 Barb. 378; *Bank v. Hammond*, 1 Rich. 281; *Southern &c. Co. v. Louier*, 5 Fla.

110; *Silver Lake Bank v. North*, 4 Johns. Ch. 376; *Tracy v. Talmadge*, 14 N. Y. 162; *Leavitt v. Palmer*, 3 N. Y. 19; *Gas Co. v. San Francisco*, 9 Cal. 453.

³ *Sherman Center Town Co. v. Morris*, (1890) 23 Pac. Rep. 569.

⁴ *Brice's Ultra Vires*, (2nd Eng. ed.) 769; *Newcastle Northern R. Co. v. Simpson*, 23 Fed. Rep. 214; *Humphrey v. Patrons' Mercantile Assoc.*, 50 Iowa, 607; *White v. Franklin Bank*, 22 Pick. 181; *In re Cork &c. Ry. Co.*, L. R. 4 Ch. 748; *Ernest v. Nicholls*, 6 H. L. Cas. 401; *Burge's and Stock's Case*, L. R. 5 Ch. 309; *Hawken v. Bourne*, 8 Mees. & W. 703; *Hall v. Swansea*, 5 Q. B. 526; *Hawtayne v. Bourne*, 7 Mees. & W. 595; *Ex parte Cropper*, 1 De Gex, M. & G. 147.

⁵ *Taylor on Corporations*, § 310, citing *Hill's Case*, L. R. 9 Eq. 605.

pensation, which should include the payment of interest also.¹ Even a religious society, formed under the auspices of the Roman Catholic church, which incorporates a mutual life insurance scheme as one of its features, can not defend against a suit on one of its policies upon the plea of *ultra vires*, when it has been receiving the assessments on the policy.² The established rule in Alabama, however, is that a corporation is not estopped, by reason of having received the benefits of a contract which is *ultra vires*, from setting up its invalidity in defense of a suit brought to enforce it.³

§ 424. Defense against a corporation which has given benefits.—It is now very well settled that a corporation can not avail itself of the defense of *ultra vires* when the contract itself has been, in good faith, fully performed by the other party, and the corporation has had the full benefit of the contract. If an action can not be brought directly upon the agreement, either equity will grant relief or an action in some other form will prevail. The same rule holds conversely. If the other party has had the benefit of a contract fully performed by the corporation, he will not be heard to object that the contract and performance were not within the legitimate powers of the corporation.⁴ In fact, the principle of the last section has been repeatedly held to be as applicable to the other contracting party as to the corporation.⁵ A purchaser

¹ Newcastle Northern R. Co. v. Simpson, 23 Fed. Rep. 214.

² Mott v. Roman Catholic Mut. Protective Soc., (1887) 70 Iowa, 455.

³ Chewacla Lime Works v. Dismukes, (1889) 87 Ala. 344; Sherwood v. Alvis, 83 Ala. 115.

⁴ Whitney Arms Co. v. Barlow, (1875) 63 N. Y. 70; *Ex parte* Chipendale, 4 De G. M. & G. 19; *In re* National &c. Soc., L. R. 5 Ch. App. 309; *In re* Cork &c. R. Co., L. R. 4 Ch. App. 748; Fishmongers' Co. v. Robertson, 5 McG. 181.

⁵ De Graff v. American &c. Co., (1860) 21 N. Y. 124, where the court says: "But again, if it be conceded that defendants had no right to enter

into the contract of sale in this case and bind the company to perform the obligations assumed, viewed as a mere question of corporate power, yet having undertaken to do so, and having received the full consideration agreed to be paid by the plaintiff, and he having fulfilled his entire contract, they can not now be permitted to set up that excess of authority to excuse them from that part of the contract which imposes an obligation upon them. It is very clear that if the plaintiff in this suit had been prosecuted upon one of the notes given by him upon the purchase, he could not, having accepted and retaining the goods, have set up

who acquired by contract and under an agreement to pay for it, the property of a corporation, can not defeat the claim for the purchase-price by impeaching the right of the corporation to become the owner of the property. One who has received from a corporation the full consideration of his engagement to pay money, either in services or property, can not avail himself of the objection that the contract thus fully performed by the corporation was *ultra vires*, or not within the chartered privileges and powers. It would be contrary to the first principles of equity to allow such a defense to prevail in an action by the corporation.¹ The only justification for such a plea by an individual sued upon a contract with a corporation is, that the obligation is not mutual, as the other party, the corporation, would not be bound by it. But upon the general ground of reason and justice no such answer can be set up. The defendants having had the benefit of the performance by the corporation of the several stipulations into which they have entered, have received the consideration for their own promise; such promise by them is therefore not *nudum pactum*; they never can want to sue the corporation upon the contract in order to enforce the performance of their stipulations which have been already voluntarily performed, and

as a defense want of power in the defendants to enter into the contract. The same rule of right and the same measure of justice will be exacted in this suit. This principle has been repeatedly held as applicable to an individual attempting to screen himself from liability when contracting with a corporation, when seeking to escape responsibility on the plea of *ultra vires* for acts deliberately done with all usual and needful formalities; and where they have received the entire benefit they contracted for, such a defense should no longer be tolerated in our courts." *National Bank v. Whitney*, 103 U. S. 99; *Diamond Match Co. v. Roeber*, 106 N. Y. 473; s. c. 60 Am. Rep. 464; *Whitney Arms Co. v. Barlow*, 68 N. Y. 62, 70; s. c. 20 Am. Rep. 504;

Steam Navigation Co. v. Weed, 71 Barb. 378; *Leavitt v. Pell*, 27 Barb. 322; *Standard Oil Co. v. Shofield*, 16 Abb. N. C. 372; *Oil Creek &c. R. Co. v. Pennsylvania Transportation Co.*, 83 Pa. St. 160, where in a suit between two corporations it was said: "We do not think the defendants are in a position to defend upon the ground of the illegality of the contract. There were mutual covenants and mutual advantages. The defendants had enjoyed the advantages such as they were." *Chicago &c. Ry. Co. v. Derkes*, 103 Ind. 520; *Ehrman v. Union Central &c. Ins. Co.*, 35 Ohio St. 324.

¹ *Whitney Arms Co. v. Barlow*, (1875) 63 N. Y. 69; *Diamond Match v. Roeber*, (1887) 106 N. Y. 473.

therefore no sound reason can be suggested why they should justify their refusal to perform the stipulations made by them on the ground of inability of the corporation, which suit they can never want to sustain.¹ Another reason for the rule is, that one is presumed to know the limitations of the authority of the corporation with which he was dealing, and is estopped to plead its want of authority.² This reason applies with peculiar force to officers of a corporation, sued by it for the conversion to their own use of stock which they had purchased for the company, and therefore they can not plead by way of defense that the purchase was *ultra vires*.³ The exact contrary of the general principle is held in Alabama, that when a person has made a contract with a corporation which is *ultra vires*, and has received the benefit of it, neither he nor those claiming under him are estopped from setting up the invalidity of the contract in defense of a suit to enforce it.⁴

¹ *Whitney Arms Co. v. Barlow*, (1875) 63 N. Y. 70; *Fishmongers' Co. v. Robertson*, 5 McG. 181; *Rutland &c. R. Co. v. Proctor*, 29 Vt. 93; *Farmers' &c. Bank v. Detroit &c. R. Co.*, 17 Wis. 372; *Silver Lake Bank v. North*, 4 Johns. Ch. 370; *Parish v. Wheeler*, 22 N. Y. 494; *Palmer v. Lawrence*, 3 Sandf. 161; *Steam Navigation Co. v. Weed*, 17 Barb. 378.

² *Pearce v. Madison &c. R. Co.*, 21 How. 441, 443; *Alexander v. Cauldwell*, 83 N. Y. 480; *Davis v. Old Colony R. Co.*, 131 Mass. 258; s. c. 41 Am. Rep. 221; *Downing v. Mt. Washington Road Co.*, 40 N. H. 230.

³ *St. Louis Stoneware Co. v. Partridge*, 8 Mo. App. 217.

⁴ *Chambers v. Falkner*, (1880) 65 Ala. 448. In this case the court gives the reason of the exceptional rule in Alabama which is consistently followed, saying: "There are authorities which support the proposition, so vigorously pressed by appellant's counsel, that as the mortgagor has reaped all the benefits of the transaction — has obtained and used

the money of the corporation — all who claim under him should be estopped from denying the corporate power to make the contract. The proposition is not new in this court. It was pressed upon the consideration of the court in the leading case of *City Council v. Montgomery &c. Co.*, 31 Ala. 76-88. In answer Stone, J. speaking for the court said: 'If this doctrine be established, these corporations, no matter how limited their powers, may make themselves omnipotent. They have only to induce persons to contract with them beyond the scope of their powers, and their very usurpations have the effect of conferring powers on them which the legislature has withheld. A proposition so erroneous can scarcely need argument to overturn it.' More recently, the proposition was again pressed, and the answer of Judge Stone was again: 'A party dealing with a corporation, in a matter not within the purview of its delegated power, does not estop himself from setting up, in defense, the want of authority in the corporation

§ 425. *Ultra vires contracts executed.*—Executed *ultra vires* contracts come under the same principle as those of the preceding sections, for the complete execution implies that a consideration has been paid to and benefits received by the corporation, and they will be enforced against it though it has exceeded its chartered powers.¹ The doctrine of *ultra vires* as a defense has died so hard that it is well to repeat the proposition which seems to be fully established by the more recent decisions, that where a contract has in good faith been fully performed either by the corporation or the other party, the one who thus has received the benefit will not be permitted to resist its enforcement by the plea of mere want of power.² Time and again corporations have been held estopped

to make the contract. . . . In such case the doctrine of estoppel can not be held to apply, without clothing corporations with the ability to increase their powers indefinitely by sheer usurpation. Such contracts on the part of a corporation are *ultra vires* and void, and no right of action can spring out of them.' *Marion Sav. Bank v. Dunkin*, 54 Ala. 471. These were not hasty, ill-considered opinions. They were the result of careful research and deliberation, and all but the latter case have stood unquestioned by the profession for many years."

¹*Bradley v. Ballard*, 55 Ill. 413; *Zabriskie v. Cleveland & C. R. Co.*, 23 How. 381; *Bissell v. Michigan & C. R. Co.*, 22 N. Y. 258; *Wright v. Hughes*, (1839) 119 Ind. 331; *Cary v. Cleveland & C. R. Co.*, 29 Barb. 35; *Goff v. American Linen & C. Co.*, 21 N. Y. 124; *McClure v. Manchester & C. R. Co.*, 13 Gray, 124; *Chapman v. Mad River & C. R. Co.*, 6 Ohio, 137; *Hall v. Mutual L. I. Co.*, 32 N. H. 295; *Railroad Co. v. Howard*, 7 Wall. 392; *Mott v. United States Trust Co.*, 19 Barb. 563; *Leazure v. Hillegas*, 7 Serg. & R. 320; *Runyon v. Coster*, 14 Pet. 122; *McLindo v.*

St. Louis, 10 Mo. 577; *Union Nat. Bank v. Mathews*, 98 U. S. 621.

²*J. C. Harper* in 12 Cent. L. J. 389; *Darst v. Gale*, 83 Ill. 136; *Lawrence, C. J.*, in *Bradley v. Ballard*, 55 Ill. 417; *Cozart v. Georgia R. Co.*, 54 Ga. 379; *Atlantic & P. Tel. Co. v. Union & C. R. Co.*, 1 Fed. Rep. 745; *Dimpfel v. Ohio & C. Co.*, 8 Reporter, 641; *Hitchcock v. Galveston*, 96 U. S. 341; *Natchez v. Mallery*, 54 Miss. 499; *Thompson v. Lambert*, 44 Iowa, 239; *Pittsburg & C. R. Co. v. Allegheny Co.*, 79 Pa. St. 210, 215; *Watts' Appeal*, 78 Pa. St. 370, 392; *De Groff v. American & C. Co.*, 21 N. Y. 124; *Galion v. Hays*, 29 Ohio St. 330, 340; *Railway Co. v. McCarthy*, 96 U. S. 258, 267; *Field, Corp.* § 273. *Contra*—older cases—which can not now be considered as the law, except in some instances, in their own States. *Hood v. New York & C. R. Co.*, 22 Conn. 502 (but see *Converse v. Norwich & C. Co.*, 33 Conn. 166, 180); *Pennsylvania & C. Co. v. Dandridge*, 9 Gill & J. 248; *Downing v. Mount Washington & C. Co.*, 42 N. H. 230; *President v. Forman*, 29 Md. 524; *Bank of Chillicothe v. Swayne*, 8 Ohio St. 257 (but see 29 Ohio St. 330 and 341; 27 Ohio St. 343).

to plead *ultra vires* to an action on the contract performed by the other parties where the corporation has received the benefit, although clearly beyond its powers.¹ Thus, where an insurance company, after assuming the policies of another company, substituted notes for the securities deposited by the latter company as required by statute, it was held that the former company could not say that the notes, by which it obtained valuable assets, were void, because *ultra vires*.² And where one sells bonds to a national bank at a certain price, the bank agreeing to resell the bonds to the vendor at the same price or less, but, the bonds subsequently appreciating in value, the bank refused to resell them, in a suit by the vendor for the breach of contract, the bank can not escape liability by setting up that it had no authority, under the national bank act, to buy the bonds, as it might have discharged its obligation by returning the bonds, and receiving back the purchase money; and to permit it to retain the bonds would be to allow it to profit by its own violation of the act.³ It is no defense to an action for breach of a contract by a corporation that, in entering into the contract, it violated its own rules, that fact being within its knowledge at the time the contract was entered into.⁴ A corporation making an *ultra vires* contract for goods and having received a part of them, the seller may recover for those actually delivered, and the company can not recoup the damages arising from want of delivery of the remainder.⁵ Likewise, a corporation may recover the value of groceries sold to the defendant through an agent of the corporation, the principal being undisclosed, although the corporation was chartered for the purpose of manufacturing woolen goods, and the sale was *ultra vires*.⁶ Conversely the other party has been held estopped where the corporation had performed the contract.⁷ So where certain

¹ Oil Creek &c. R. Co. v. Pennsylvania &c. Co., 83 Pa. St. 160; State Board v. Citizens' St. Ry. Co., 47 Ind. 407.

² Relfe v. Columbia Life Ins. Co., 10 Mo. App. 150.

³ Logan Co. Nat. Bank v. Townsend, (Ky. 1887) 3 S. W. Rep. 122.

⁴ Samuel v. Fidelity & Casualty Co., (1888) 49 Hun, 122.

⁵ Day v. Spiral Spring Buggy Co., (1885) 57 Mich. 146.

⁶ Slater Woolen Co. v. Lamb, (1887) 143 Mass. 420.

⁷ Whitney Arms Co. v. Barlow, 63 N. Y. 62; Newbury &c. Co. v. Weare,

residents of a county bound themselves for enough to pay for a right of way, and the company constructed the road, the promisors could not plead *ultra vires*.¹ And generally, the power of a corporation to purchase and sue upon bonds can not be questioned by the obligor in the bonds.² It has been very justly said that as it is manifest that the State has an ample remedy for misuse or abuse of powers conferred upon a corporation, or for a usurpation of powers and franchises not conferred upon it; and that the application of the doctrine of *ultra vires* can be of no service to the State in restraining usurpations of power on the part of the corporation, or in promoting the public interest, while it encourages dishonesty and sets aside general principles of the law by enabling a corporation to take advantage of its own wrong, therefore the doctrine of *ultra vires*, so far as it affects executed contracts, is wanting in principle and rests upon no solid foundation.³

§ 426. *Ultra vires contracts executory only.*—Contracts made in excess of the powers of a corporation which are executory on both sides, no part of the consideration having been paid, will not be enforced.⁴ One court has distinctly stated the limits of the proposition in saying that, as it understands, the rule *ultra vires* prevails in full force only where the contracts of private corporations remain wholly executory.⁵ Where a corporation makes a contract that is in excess of its chartered powers, it may well be that while the agreement remains wholly executory it can not be enforced. So long as the contract is unexecuted it does not estop the corporation, because the power of a corporation, like that of a person under a legal disability, can not be enlarged by the mere form of a contract which it had no capacity to make.⁶ Accordingly *ultra vires* may be pleaded to a covenant to pay in advance rent reserved in a written lease, the consideration being future not past

27 Ohio St. 343, 353; *Chester Glass Co. v. Dewey*, 16 Mass. 94, 102; *Gold Min. Co. v. National Bank*, 96 U. S. 640; *National Bank v. Matthews*, 98 U. S. 621.

¹ *Chicago & Atlantic Ry. Co. v. Derkes*, 103 Ind. 520.

² *Franklin Avenue German Sav-*

ings Inst. v. Roscoe Board of Education, 75 Mo. 408.

³ *G. W. Field* in 13 Am. L. Rev. 658.

⁴ *Parish v. Wheeler*, 22 N. Y. 508.

⁵ *Thompson v. Lambert*, (1876) 44 Iowa, 248.

⁶ *Wright v. Hughes*, (1889) 119 Ind. 329; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543.

occupation.¹ And where a banking corporation, through its president, subscribed to a creamery, but before any act was done or expenditures made on the faith of his subscription, it was withdrawn; it was held that as it was simply an executory contract, the subscription could at the time be withdrawn, and that the bank was not liable.² Conversely, a corporation can not enforce an executory contract made in excess of its powers.³ Where the contract is *ultra vires* and irregular and the claim is merely for the recovery of a sum of money, acts of part performance or even full performance will not cure the insufficiency of the contract, and the other contracting party may plead *ultra vires*.⁴ So no action lies for money due under a verbal contract to employ a person for a matter outside of the ordinary business of the company.⁵ If, however, there have been acts of part performance which the company must be taken to have acquiesced in and to have thus adopted the contract, specific performance will be decreed.⁶

§ 427. Acts ultra vires because of a particular purpose.—When an act in its external aspect is within the general powers of a company, and is only unauthorized because it is done with a secret unauthorized intent, the defense of *ultra vires* will not prevail against a stranger who dealt with the company without notice of its intent.⁷ That a mining plant bought by a mining company and adapted to its business contained some properties that the company buying might not be authorized to purchase, does not avoid the notes given for the plant.⁸ So if a company properly using land purchase

¹ Oregonian Ry. Co. v. Simpson, 23 Fed. Rep. 214.

² Holt v. Winfield Bank, 25 Fed. Rep. 812.

³ Nassau Bank v. Jones, 95 N. Y. 115.

⁴ Crampton v. Varna Ry. Co., (1872) 7 Ch. 562; Jackson v. North Wales Ry. Co., 6 R. C. 113.

⁵ Cope v. Thames Haven Dock & Ry. Co., 3 Ex. 841; Browne & Theobald's Railway Law, 108.

⁶ Wilson v. West Hartlepool Ry. Co., 2 De Gex, J. & S. 475; Laird v. Birkenhead Ry. Co., Johnson, (Eng.

V.-Ch.) 500; London &c. Ry. Co. v. Winter, Craig & P. 57; and see Crook v. Corporation of Seaford, 6 Ch. 551.

⁷ Miners' Ditch Co. v. Zellerbach,

37 Cal. 543; Tracy v. Talmage, (1856) 14 N. Y. 162; s. c. 67 Am. Dec. 132;

Moss v. Rossie &c. Co., (1843) 5 Hill, 137; Oxford Iron Co. v. Spradley, (1874) 51 Ala. 171; Natoma Water &c. Co. v. Clarkin, (1860) 14 Cal. 544, 552; Thompson v. Lambert, 44 Iowa, 239; Eastern Counties Ry. Co. v. Hawkes, 5 H. L. Cas. 331.

⁸ Moss v. Rossie &c. Co., (1843) 5 Hill, 137.

other lands it can not evade payment by pleading that the purchase was unnecessary for the purposes of the corporation.¹ A lender to a company having power to borrow money need not see to it that it is applied to its legitimate business.² The rule as to participation with a corporation in doing an *ultra vires* act is based upon no different principle than that of participation in any illegal contract.³ And the fact of knowledge of the company's purpose without any fraudulent intent on the part of the person dealing with it will not defeat the latter's action.⁴

§ 428. Liability of corporation for ultra vires torts.—

The general doctrine is now held that a corporation is liable for the negligence and other torts of its agents and servants even when relating to and connected with acts of the corporation that are *ultra vires*.⁵ Corporations like natural persons have power and capacity to do wrong. They may, in their contracts and dealings, break over the restraints imposed upon them by their charters; and when they do so, their exemption from liability can not be claimed on the mere ground that they have no attributes or faculties which render it possible for them thus to act.⁶ Liability for torts is indeed a necessary corollary to the principle that the corporate powers and faculties may be exercised by legal representatives.⁷ It follows therefore that a corporation, although regarded as an artificial entity incapable of malice, which is a necessary incident of libel, is yet responsible for a libel committed by its agents in the course of its business, for they, as it were, transfer to the corporation the requisite qualities which make the libel possible.⁸ This principle has been frequently recognized

¹ *Natoma &c. Co. v. Clarkson*, (1860) 14 Cal. 544, 552.

² *Thompson v. Lambert*, (1876) 44 Iowa, 239; *Bradley v. Bullard*, 55 Ill. 413.

³ *Tracy v. Talmadge*, (1856) 14 N. Y. 162.

⁴ *Thompson v. Lambert*, (1876) 44 Ia. 239; *Parish v. Wheeler*, 22 N. Y. 494.

⁵ *Merchants' Bank v. State Bank*, (1870) 10 Wall. 604; *National Bank*

v. Graham, (1879) 100 U. S. 609; *Bissell v. Michigan &c. R. Co.*, (1860) 22 N. Y. 258; *Buffet v. Troy &c. R. Co.*, (1869) 40 N. Y. 168; *Booth v. Farmers' Bank*, (1872) 50 N. Y. 396; *Green v. Brice's Ultra Vires*, 263, n.

⁶ *Bissell v. Michigan &c. R. Co.*, (1860) 22 N. Y. 258.

⁷ *Railroad Co. v. Quigley*, 21 How. 202.

⁸ *F. L. Cline* in 5 So. L. Rev. 415.

and applied to various other torts, such as trespass, assault and battery, personal injuries, false representations and fraud.¹ Therefore a corporation, when sued for a tort, can not defend on the ground that the act from which the tort resulted was *ultra vires*.² Conversely, when damage is done to real estate held by a corporation, the party by whose negligence it was caused can not escape responsibility by showing that the corporation was not permitted by its charter to acquire title to the property, or that it acquired it for purposes unauthorized by law.³ And it has even been held that where a corporation seeks an accounting upon an executed partnership transaction, the defendant can not set up that a partnership transaction was *ultra vires*, under the plaintiff's charter.⁴

§ 429. The right to restrain ultra vires acts.— The right of a stockholder to restrain the corporation from *ultra vires* acts is universally recognized. And this right may be exercised also by a creditor, either when the corporation is about to do such an act, or when the directors, or other officers or agents, purpose to assume powers not conferred upon the corporation.⁵ This is a just and equitable right of the stockholders. They have a right, by virtue of the contract entered into by and between them and the corporation, to have the

¹ McReady v. Guardians, 9 Serg. & R. 94; Moore v. Fitchburg R. Co., 4 Gray, 465; Railroad Co. v. Derby, 14 How. 468; Etting v. Bank of United States, 11 Wheat. 59; National Exchange Co. v. Drew, 2 Macq. H. L. Cas. 103. *Vide infra*, Chapter XXIII.

² Gruber v. Washington &c. R. Co., 92 N. C. 1.

³ Farmers' Loan & Trust Co. v. Green Bay & Minnesota R. Co., 11 Biss. C. Ct. 334.

⁴ Standard Oil Co. v. Scofield, 16 Abb. N. Cas. 372.

⁵ 2 Redfield on Railways, § 211; Kean v. Johnson, 1 Stock. (N. J.) 401; March v. Easton, 40 N. H. 548; Pratt v. Pratt, 33 Conn. 446; Durfee v. Old Colony &c. R. Co., 5 Allen, 230; Allen

v. Curtis, 26 Conn. 456; McAleer v. McMurry, 38 Pa. St. 126; Green's Brice's *Ultra Vires*, 73, 83, 215, 593; Kernighan v. Williams, L. R. 6 Eq. 228; Atty.-Gen. v. Eastlake, 11 Hare, 205; Atty.-Gen. v. Norwich, 25 L. J. Ch. 141; Zabriskie v. Cleveland &c. R. Co., 23 How. 381; Memphis v. Dean, 8 Wall. 64; Bellmont v. Erie &c. R. Co., 52 Barb. 637; Bliss v. Anderson, 31 Ala. 613; Black v. Delaware &c. R. Co., 7 C. E. Green, 130; s. c. 9 C. E. Green, 455; Zabriskie v. Hackensack &c. R. Co., 3 C. E. Green, 130; Balfour v. Earnest, 5 C. B. N. S. 691; Mayor v. Groshon, 30 Ind. 436; Coleman v. Eastern &c. R. Co., 10 Beav. 1; Solomans v. Laing, 12 Beav. 339; Fisk v. Chicago &c. R. Co., 53 Barb. 513.

funds of the corporation appropriated to the objects and purposes for which it was instituted, and to dividends arising therefrom. The creditors have also the right to restrain general speculations and *ultra vires* acts, as they have become creditors with the knowledge and understanding that the corporation was constituted for certain purposes and with certain powers, and it is to be presumed that the credit was given with a full knowledge of these matters, and in reliance on the ability of the debtor to meet the obligation based upon such purposes and powers.¹ The right of a shareholder to maintain a bill in equity to impeach *ultra vires* acts extends also to acts of a majority of the stockholders.² As corporate acts are done by directors, or officers who are trustees for the purpose of carrying out the purpose of incorporation, it is the duty of courts of equity to protect stockholders and creditors, by requiring the officers to keep within the limits of corporate powers.³ If, then, a corporation makes a contract manifestly beyond its powers, a court of chancery on the application of a stockholder, who has not participated or acquiesced in the act, will restrain the corporation from carrying out the contract.⁴ But a court of law will sustain no action on such a contract against the corporation.⁵ The courts will of course not sustain a bill in equity against acts not *ultra vires* and performed with all required formality, unless in case of fraud or oppression.⁶ For a court of equity will not unnecessarily interfere with the internal policy of a corporation.⁷ It has been said that "no case can be found where the general management of corporate property has been subject to the restrictions of judicial powers, unless, indeed, in the case of a clear violation

¹ G. W. Field in 13 Am. L. Rev. 659.

² City of Chicago v. Cameron, 120 Ill. 447.

³ Selden, J. in Bissell v. Michigan &c. R. Co., 22 N. Y. 258; Coleman v. Eastern &c. R. Co., 10 Beav. 1; Cohen v. Wilkinson, 12 Beav. 125; Solomans v. Laing, 12 Beav. 339.

⁴ Davis v. Old Colony R. Co., 131 Mass. 258; s. c. 41 Am. Rep. 221.

⁵ Elevator Co. v. Memphis & Charleston R. Co., (1887) 85 Tenn. 703; s. c. 4 Am. St. Rep. 798.

⁶ Gorman v. Guardians' Sav. Bank, 4 Mo. App. 180; Macdougall v. Gardiner, 1 Ch. Div. 13; Pender v. Lushington, 1 Ch. Div. 70; Bagshaw v. Eastern Union Ry. Co., 7 Hare, 114; Foss v. Harbottle, 2 Hare, 495.

⁷ Beecher v. Wells &c. Co., 1 Fed. Rep. 276; Camblos v. Philadelphia &c. R. Co., 4 Brews. 563; Bach v. Pacific &c. Co., 12 Abb. Pr. N. S. 373; Bloxham v. Metropolitan Ry. Co., L. R. 3 Ch. 337; Walker v. Mad River &c. Ry. Co., 8 Ohio, 88.

of express law; or a wide departure from chartered powers."¹ The court can not undertake to decide questions of corporate polity merely.² Nor can it attempt to supply the only prerequisite to the adoption of any corporate policy — to wit, a majority vote of the stockholders.³ This rule is only departed from when there are such dissensions in the corporate management as to make it practically impossible to carry on the business.⁴ Where shareholders are deprived of their rights of representation, *ultra vires* acts may be restrained pending litigation to enforce the right of representation.⁵ It is universally held that an uninterested person and one not a stockholder, can not raise the question of *ultra vires* in an action against the company.⁶ Persons not members of a corporation have no cause of action against it for violation of its constitution by its officers and members.⁷

§ 430. A single stockholder may restrain *ultra vires* acts.—As any stockholder may restrain the diversion of corporate funds for any purpose not embraced in the original purposes of the corporation, so no majority, however large, can compel a stockholder to submit to any fundamental change in the business or objects of the company.⁸ A stockholder, by becoming such, contracts with the corporation that he will submit his interest to the direction and control of the proper officers of the company in carrying out the objects and purposes for which it was instituted; and the undertaking on the part of the company is, that the objects and purposes of its institution shall not be changed, without at least the unani-

¹Bach v. Pacific &c. Co., 12 Abb. Pr. N. S. 373.

²Tuscaloosa Manuf. Co. v. Cox, 68 Ala. 71; Fountain Ferry &c. Co. v. Jewell, 8 B. Mon. 140.

³Tuscaloosa Manuf. Co. v. Cox, 68 Ala. 71; Ramsey v. Erie Ry. Co., 7 Abb. Pr. N. S. 156; Edwards v. Shrewsbury &c. Ry. Co., 2 De Gex & S. 537; Bailey v. Birkenhead &c. Ry. Co., 12 Beav. 433.

⁴Lawrence v. Greenwich &c. Co., 1 Paige, 587; Featherston v. Cooke,

L. R. 16 Eq. 298; Trade Auxiliary Co. v. Vickers, L. R. 16 Eq. 303.

⁵Mackintosh v. Flint &c. R. Co., 34 Fed. Rep. 582.

⁶New Orleans, Mobile &c. R. Co. v. Ellerman, (1881) 105 U. S. 166.

⁷Tomlinson v. Bricklayers' Union, 87 Ind. 308.

⁸Clearwater v. Meredith, 1 Wall. 25; Hartford &c. R. Co. v. Crosswell, 5 Hill, 383; McCray v. Junction R. Co., 9 Ind. 358; Winter v. Muscogee R. Co., 11 Ga. 438; Middlesex &c. Co. v. Locke, 8 Mass. 268.

mous consent of all the stockholders, and that no other responsibilities or hazards shall be imposed on the stockholder, than those that grow out of the original undertaking.¹ As intimated, the right to restrain by injunction exists in a stockholder though every other stockholder may favor the *ultra vires* acts.² And this is so even if a majority of the shareholders at a meeting of the company condemn the course adopted by the plaintiff.³ For it is not within the power of the majority to ratify any *ultra vires* act against the will of a single dissenting shareholder.⁴ In case an action is brought, it may be brought solely on behalf of the plaintiff, or it may be brought as representative of others also; and when the acts complained of are of those having control of a majority of the stock, the company may be made a party defendant.⁵ When an agreement has been made by the president of a railroad, subject to the approval of the directors and stockholders, to do something which is *ultra vires*, and the directors have approved it, the court will interfere by injunction upon the application of a single stockholder.⁶ Where the president of a railroad is the general manager, and constitutes about all there is of the company, a demand upon and a re-

¹ G. W. Field in 13 Am. L. Rev. 659.

² Hoole v. Great W. R. Co., L. R. 3 Ch. App. 262; Menier v. Hooper Tel. Works, L. R. 9 Ch. App. 350; Bird v. Bird & Co., L. R. 9 Ch. App. 358; Green's Brice's *Ultra Vires*, 598.

³ See Beman v. Bufford, 1 Sim. (N. S.) 550; s. c. 20 L. J. Ch. 537; Winch v. Birkenhead Ry. Co., 16 Jur. 1035; Bagshaw v. Eastern Union Co., 19 L. J. Ch. 410; Haen v. London & N. W. Ry. Co., 30 L. J. Ch. 817; Great Western Ry. Co. v. Rushout, 5 De Gex & S. 290.

⁴ Bird v. Bird's Patent & Co., 9 Ch. 358; Abbott v. American & Co., 4 Blatch. 489; s. c. 33 Barb. 578; Adriance v. Roome, 52 Barb. 399; Taylor v. Earle, 8 Hun, 1; Smith v. New York & Co., 18 Abb. Pr. 419; Brady v. Mayor, 16 How. Pr. 432;

Barclay v. Quicksilver Mining Co., 9 Abb. Pr. N. S. 284; Kean v. Johnson, 9 N. J. Eq. 401; Middlesex & Co. v. Boston & Co. R. Co., 115 Mass. 347; Robbins v. Clay, 33 Me. 132; Tippecanoe County v. Lafayette & Co. R. Co., 50 Ind. 85; Ashbury Railway Carriage Co. v. Rishe, L. R. 7 H. L. 653; Lyde v. Eastern Bengal Ry. Co., 36 Beav. 10; Taylor on Corporations, 268.

⁵ Atwood v. Merryweather, 5 Eq. 464, and note; Menier v. Hooper's Tel. Works, 9 Ch. App. 350; Mason v. Harris, 11 Ch. Div. 97; 27 Week. Rep. 699; Browne & Theobald's Railway Law, 104; Hoole v. Great Western Ry. Co., 3 Ch. 262; Simpson v. Westminster & Co. Hotel Co., 8 H. L. Cas. 712.

⁶ Elkins v. Camden & Atlantic R. Co., 36 N. J. Eq. 5.

fusal by him is sufficient to entitle the stockholder to bring suit in his own name to have construction bonds of the company, unlawfully issued by the president, declared *ultra vires* and void.¹ And where a court of equity would have interfered at the suit of the stockholder, to prevent the unlawful delivery of the bonds by the president to pay the debts of other corporations which he controlled, it will interpose, after there has been such delivery, and cancel the bonds in the hands of holders with notice, and release the trust deed securing them.² Thus where, in a suit by the stockholders of a railroad company to have certain of its construction and equipment bonds declared *ultra vires*, and the deed of trust securing them canceled, the court found that the president and general manager, without any authority, used the bonds which came into his hands to pay debts of other corporations of which he had control, and "not in any way about the construction, equipment, or operation" of the railroad company, and that the holders of the bonds acquired them with full notice of such misapplication; the findings excluded the hypothesis that the corporations whose debts were thus paid might have agreed to construct or equip the road in part, and were sufficient to support a decree declaring the bonds null and void as against the railroad company.³

§ 431. Acquiescence in *ultra vires* acts.—If a stockholder assents to acts *ultra vires* or although, not originally or expressly assenting, has for an unreasonable time acquiesced and has permitted them to go unquestioned, so that other parties who have acted upon the faith of them (as, for instance, by making large expenditures of money) would suffer great injury from their repudiation, a court of equity will not easily be induced to grant relief at the instance of such a stockholder.⁴ The stockholder who seeks to prevent the consummation of an *ultra vires* corporate act, or to avoid it, should be swift to make known his desires and assert his rights

¹ City of Chicago v. Cameron, (1887) 120 Ill. 447.

² City of Chicago v. Cameron, (1887) 120 Ill. 447.

³ City of Chicago v. Cameron, (1887) 120 Ill. 447.

⁴ Stewart v. Erie &c. Co., 17 Minn. 372.

through the tribunals appointed for that purpose.¹ While a majority of the stockholders of a corporation may maintain a bill in equity in behalf of themselves and other stockholders, for fraud, conspiracy, or acts *ultra vires*, against the corporation, its officers, or others who participate therein, the minority stockholders, when they have been injured or damaged by such acts, must act promptly, and not wait an unreasonable time. If they postpone their complaint from seven to fifteen years, they forfeit their right to equitable relief.² As the stockholders may be presumed to know what is done by their agents, the directors and officers of the corporation, if they neglect to restrain acts which may be *ultra vires*, and only after some considerable delay make any objection thereto, neither the corporation, directors nor stockholders should be heard to complain that the acts were *ultra vires* and therefore void.³ More especially is this so when the complainant

¹Thompson v. Lambert, (1876) 44 Iowa, 247; Watts' Appeal, 78 Pa. St. 370.

²Alexander v. Searcy, (1889) 81 Ga. 536. A delay of three and a half years was held a bar in Peabody v. Flint, 88 Mass. 54, six years in Gregory v. Patchett, 33 Beav. 595, seven years in Ashurst's Appeal, 60 Pa. St. 290, and three years and eight months in Dimpfell v. Ohio &c. R. Co., 110 U. S. 209.

³G. W. Field in 13 Am. L. Rev. 661; Zabriskie v. Cleveland &c. R. Co., (1859) 23 How. 381; Cary v. Cleveland &c. R. Co., 29 Barb. 39; Argenti v. San Francisco, 16 Cal. 255; McClure v. Manchester &c. R. Co., 13 Gray, 424; Chapman v. Mad River &c. R. Co., (1856) 6 Ohio St. 137; Hale v. Mutual &c. Co., 22 N. H. 297; Railroad v. Howard, 7 Wall. 413. The injustice of allowing such a plea as a defense to a claim on a contract, in case such stockholders have with knowledge of the facts received the benefits and the fruit of such contract, as where they have

received dividends the whole or part of which were derived from such contract, will be apparent. Such action on the part of the stockholders would undoubtedly be treated as an affirmance of the *ultra vires* act, and estop them from pleading *ultra vires* as a defense to a claim on such contract, either against them as stockholders, or against the corporation. The remedy of the stockholder or creditor is, as we have seen, ample in the first instance, and they may enjoin an *ultra vires* act, on the part of the corporation or its directors, or other officers or agents; but if they remain indifferent and passive, and permit a contract *ultra vires* to be made, and especially where they receive the benefits of such contract without objection, they should not be permitted to enjoin the corporation from executing the contract on its part. Certainly it would be more consonant with principles of justice and equity to require the stockholders to restrain the officers and agents of a corporation from *ultra vires*

has stood by and allowed the illegal transaction to be consummated and has allowed and induced others to become interested in the corporation on the supposition that the existing state of things is legal and proper.¹ Though purchasing, owning and voting stock in one railroad company by another railroad company may be *ultra vires* so far as the public is concerned, still a stockholder who has acquiesced therein for fifteen years and received money from the corporation by reason of the illegal act, is not allowed to raise that question. His acquiescence does not render valid the illegal act, but prevents him from taking advantage of its illegality. The public or the State is not thus bound.² Where the summary interference of the court is invoked in cases of this nature it must be invoked promptly. Parties who have lain by and permitted a large expenditure to be made in contravention of the rights for which they contend can not call upon the court for its summary interference.³ Because there is an adequate means open both to stockholders and to creditors for preventing the commission of acts in excess of the corporate powers. It is the privilege, if not the duty, of those interested to prevent *ultra vires* acts by injunction.⁴

§ 432. Ratification of *ultra vires* acts.—A ratification of *ultra vires* acts is sufficient, if made with a full knowledge of all the material facts,⁵ to estop the shareholders from afterwards setting up the want of corporate power; and this rule includes not only those having actual knowledge but also one who purposely shuts his eyes to means of information within his own possession and control and ratifies an act de-

contracts than to allow them to remain indifferent and take the benefits of such contracts, and then allow the plea of *ultra vires* in defense of an action on them. The officers and agents of the corporation are the officers and agents of the stockholders, as well as their trustees; and it would be far more reasonable that they should suffer loss by reason of *ultra vires* acts, which they might with due diligence have prevented, than to allow them or the corpora-

tion to set up such a defense where they have received the benefits of the acts. G. W. Field in 13 Am. L. Rev. 661.

¹ Terry v. Eagle Lock Co., 47 Conn. 141, 161.

² Alexander v. Searcy, (1889) 81 Ga. 536.

³ Houldsworth v. Evans, L. R. 3 H. L. 263.

⁴ G. W. Field in 13 Am. L. Rev. 660.

⁵ Kelley v. Newburyport &c. R. Co., (1886) 141 Mass. 498.

liberately, having all the knowledge in respect to it which he cares to have.¹ In accordance with this rule, a settlement, effected by the directors of a railway company by giving notes for a road built and afterward used, should be regarded as ratified by the company, where for a number of years it has not disputed its liability on the notes, has paid interest on them, has continued to use the road, and has accepted reports which mentioned them amongst the outstanding obligations.² The stockholders of a corporation having acknowledged the liability of the company for a particular debt, they can not afterwards repudiate it on the ground that it was in excess of the indebtedness which the corporation was authorized by law to contract.³ A purchase of shares in a railway corporation by one who knows that the company is investing in the stock of railway corporations without the State which created it, operates as an implied recognition of its power to do so.⁴ And where a corporation acted for several years under a contract of consolidation, made mortgages, and sold bonds to *bona fide* purchasers, both it, and its stockholders, were estopped to assert that the contract was *ultra vires*.⁵ Torts are among the acts that can be ratified by acquiescence in the course of action leading to them, as where a railway corporation, running a steamboat beyond its powers, is estopped from setting up the defense of *ultra vires* in an action for an injury sustained through the negligence of an officer of the steamboat.⁶

§ 433. Estoppel if *ultra vires* contract is executed.—A stockholder of a corporation will not be allowed after an unreasonable time to disturb and rescind a contract made by his corporation, after the same has been fully executed, on the ground of *ultra vires*.⁷ If stockholders or creditors permit

¹ *Kelley v. Newburyport &c. R. Co.*, (1886) 141 Mass. 499; *Combs v. Scott*, 12 Allen, 493, 497; *Phosphate &c. Co. v. Green*, L. R. 7 C. P. 43, 57.

² *Kelley v. Newburyport &c. R. Co.*, (1886) 141 Mass. 496.

³ *Poole v. West Point &c. Assoc.* 30 Fed. Rep. 513.

⁴ *Venner v. Atchison &c. R. Co.*, 28 Fed. Rep. 581.

⁵ *Dimpfel v. Ohio & Mississippi Ry. Co.*, 9 Biss. C. Ct. 127.

⁶ *Central R. &c. Co. v. Smith*, 76 Ala. 572; S. C. 52 Am. Rep. 353.

⁷ *Taylor v. South &c. R. Co.*, 4 Woods, 575.

a corporation to enter into an *ultra vires* contract, or, with knowledge that it has done so, accept the benefits thereof without objection, they should not be allowed to object to the contract on the ground that it is *ultra vires*.¹ For a court of equity may refuse to interfere with a corporation at the instance of a stockholder in respect to an unauthorized contract which has been fully executed, when if he had applied in season for an order to restrain the execution of it, equity might have felt bound to grant that relief.² The fact that acts complained of were *ultra vires* the company does not diminish the force and effect of the laches. If stockholders lie by, sanctioning, or seeming by their silence to sanction, such unwarrantable acts of the company, they will be bound by them. In order to set them aside, they must take timely steps to have them vacated. They can not wait to see if such acts will prove beneficial or not, and thus take their chances on the result. And this same rule holds, as between a minority of the shareholders and the acts of the majority. Supineness in such cases will be construed as acquiescence of the minority in the acts of the majority.³ And so every stockholder of a corporation who participates in the fruits of an *ultra vires* act, is estopped from setting up the corporation's want of authority to perform it.⁴ In these cases the plaintiff's recovery rests on the circumstance that all the persons that would have been entitled to object to the contract allowed him to go on and perform his part thereof under the reasonable assumption of their general acquiescence therein.⁵ Thus in New Jersey it has been decided, in accordance with these

¹ Field on Corp. § 265.

² Terry v. Eagle Lock Co., 47 Conn. 141, 161.

³ Burgess v. St. Louis County R. Co., (Mo. 1890) 7 Ry. & Corp. L. J. 299. In this case it was said that the fact of the statute of limitations not having run does not help the matter. Laches is as good a bar to the enforcement of a stale claim as ever it was. Here eleven years had elapsed since a trust deed and seven years since a compromise under it,

which were alleged to be *ultra vires*, had taken place.

⁴ Branch v. Jessup, 106 U. S. 468; Zabriskie v. Cleveland & C. R. Co., 23 How. 381; Taylor v. South & North Alabama R. Co., 13 Fed. Rep. 152; Tyrell v. Cairo & C. R. Co., 7 Mo. App. 294; Peoria & C. R. Co. v. Thompson, 103 Ill. 187.

⁵ Taylor on Corporations, §§ 279, 280, reviewing Bissell v. Michigan & C. R. Cos., 22 N. Y. 258; Bradley v. Ballard, 55 Ill. 413; s. c. 7 Am. Rep. 656; Durst v. Gale, 83 Ill. 136.

principles, that a railway company will be estopped from setting up as a defense to an action for rent, on a lease of a branch road, the plea of *ultra vires*, when the branch was constructed upon the company's promise to lease it for a long term of years, and when it has actually operated it for a time without objection.¹

§ 434. Right of the State in case of *ultra vires* acts.—Wilful assumptions and intentional usurpations of corporate authority or any abuse, misuse, or non-use of its franchises, justifies a proceeding by or in the nature of *quo warranto*, and a judgment of forfeiture of the franchise possessed.² The misuser or usurpation of any franchises has from the earliest times been corrected by an information and the writ of *quo warranto*. A franchise being a portion of the royal prerogative existing in the hands of a subject, to misuse or usurp this delegated right is a clear infringement in which the sovereign is directly interested. On this ground the remedy under consideration is still resorted to.³ It is well settled that it is a tacit condition of a grant of incorporation that the grantees shall act up to the end or design for which they were incorporated, and hence through neglect or abuse of its franchises a corporation may forfeit its charter as for condition broken.⁴ It may be affirmed as a general principle that where there has been a misuser or non-user in regard to matters which are of the essence of the contract between the corporation and the State, and the acts or omissions complained of have been repeated and wilful, they constitute a just ground of forfeiture.⁵ Thus if a corporation authorized to do an insurance business embarks in a general banking business, a judgment of forfeiture or ouster would be a proper one in any

¹ Camden &c. R. Co. v. May's Landing &c. R. Co., 48 N. J. 530.

² High on Extr. Rem. § 616; State v. Wadkins, 15 Ohio St. 114; State v. Taylor, 15 Ohio St. 137; Updegraff v. Evans, 47 Pa. St. 108; Hullman v. Houcomp, 5 Ohio St. 237; Commonwealth v. Commercial Bank, 28 Pa. St. 383; People v. Kingston &c. Co., 23 Wend. 193; Mumma v.

Potomac Co., 8 Pet. 287; Terrett v. Taylor, 9 Cranch, 43.

³ People v. Utica Ins. Co., 15 Johns. 353; State v. Milwaukee &c. Ry. Co., 45 Wis. 579; State v. Barron, 57 N. H. 498.

⁴ Commonwealth v. Commercial Bank, 28 Pa. St. 383.

⁵ Commonwealth v. Commercial Bank, 28 Pa. St. 383.

court having jurisdiction of the matter.¹ But proceedings can not be maintained by the attorney-general to restrain a corporation from doing *ultra vires* acts which are acquiesced in by all the shareholders and are not injurious to the rights of creditors, unless they be shown to be illegal, that is, in contravention of some statute, or *mala per se* or against public policy.² Such a proceeding has been entertained where a railroad was acquiring a monopoly of the coal trade of a certain district.³ And it may be resorted to in cases of public nuisance such as affect or endanger the public safety or convenience and require immediate judicial interposition.⁴ In all other cases the proper proceeding is by *quo warranto* to oust the corporation from its franchises.⁵

§ 435. Forfeiture of franchise.—The right of forfeiture for misuser or non-user of its franchises is annexed as an implied condition to the existence of every corporation, and is reserved to the State, without express mention, in the grant of every charter.⁶ Of course the forfeiture may only be made by the sovereign power.⁷ The question of forfeiture can not be raised in a collateral proceeding.⁸ So whether a corporation has

¹ *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358.

² *Attorney-General v. Tudor Ice Co.*, 104 Mass. 237; s. c. 6 Am. Rep. 227, and authorities there reviewed at length; *United States v. Union Pacific R. Co.*, 98 U. S. 569; *Attorney-General v. Utica Ins. Co.*, 2 Johns. Ch. 371, and authorities there reviewed; *Attorney-General v. Great Eastern Ry. Co.*, 11 Ch. Div. 449; *Attorney-General v. Cockermouth Local Board*, 18 Eq. 172; *Attorney-General v. Reynolds*, 1 Eq. Cas. Ab. (3d ed.) 131; *Browne & Theobald's Ry. L.* 97. *Contra*, *Hare v. London &c. Ry. Co.*, 2 Johns. & H. 80, 111; *Liverpool v. Chorley Water Works Co.*, 2 De Gex, M. & G. 852, 860; *Ware v. Regents' Canal Co.*, 3 De Gex & J. 212, 228, which, however, are declared mere *dicta* in *Attorney-*

General v. Tudor Ice Co., 104 Mass. 237; s. c. 6 Am. Rep. 227.

³ *Attorney-General v. Great Northern Ry. Co.*, 1 Dr. & S. 154.

⁴ *District-Attorney v. Lynn &c. R. Co.*, 16 Gray, 242; *Attorney-General v. Cambridge*, 16 Gray, 553; *Attorney-General v. Boston Wharf Co.*, 12 Gray, 553; *Rowe Granite Co. v. Bridge Co.*, 21 Pick. 344, 347; *Attorney-General v. Shrewsbury Bridge Co.*, 21 Ch. Div. 752; *Browne & Theobald's Ry. Law*, 97.

⁵ *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358; *Attorney-General v. Tudor Ice Co.*, 104 Mass. 237; s. c. 6 Am. Rep. 227.

⁶ *Ferrett v. Taylor*, 9 Cranch, 43.

⁷ *Mumma v. Potomac Co.*, 8 Pet. 281; *Commonwealth v. Union &c. Co.*, 5 Mass. 230.

⁸ *Bank of Missouri v. Merchants' Bank*, 10 Mo. 123.

misused or abused its franchise is a question between the State and the corporation, which can not be raised or litigated in an action between the corporation and private parties.¹ Thus a plaintiff corporation, having shown no violation of duty to itself, can not complain of the acts of defendant corporation on the ground of *ultra vires*. Only the State or defendant's stockholders can maintain an action on that ground.² An "association, or number of persons," who, in conducting the business of insurance, profess to limit their liability to the amount of money contributed by each, and assume to give perpetuity to the business by making membership certificates transferable by the assignment of the member or his personal representatives, are "acting as a corporation," so as to authorize a judgment of ouster on *quo warranto* where they are not legally incorporated.³ In *quo warranto* proceedings against a corporation based on informalities and irregularities in its attempt to organize, judgment of ouster was rendered against it; but it was held, notwithstanding, that transactions had in good faith between it and others before the institution of the *quo warranto* proceedings, were valid, it having acted as a corporation *de facto*.⁴ The declaration of a forfeiture has been decided not to be in violation of the law forbidding the impairing the obligation of contracts.⁵ When a charter is repealed by the legislature the State need not first, by judicial process, prove a breach of its conditions. In this case

¹ *Southern Pac. R. Co. v. Orton*, (1887) 32 Fed. Rep. 457. The right to object to the legal capacity of a corporation to hold real estate, is vested in the Commonwealth alone. *Hickory Farm Oil Co. v. Buffalo &c. R. Co.*, 32 Fed. Rep. 22. Accordingly a deed of land to a corporation is valid even though it is prohibited by its charter from holding real estate, until the State vacates such deed by a direct proceeding instituted for that end. *Mallett v. Simpson*, 94 N. C. 37; s. c. 55 Am. Rep. 594. And a conveyance of land to a foreign corporation forbidden by statute to acquire and hold real estate,

is not void, but passes the title to the corporation, and it may hold the property subject to the Commonwealth's right of escheat. *Hickory Farm Oil Co. v. Buffalo &c. R. Co.*, 32 Fed. Rep. 22. *Cf.* *Commonwealth v. New York &c. R. Co.*, 114 Pa. St. 340.

² *Belcher's &c. Co. v. St. Louis &c. Co.*, (1890) 13 S. W. Rep. 822.

³ *Greene v. People*, (Ill. 1889) 21 N. E. Rep. 605; Ill. Rev. Stat. ch. 112.

⁴ *Perun Society v. Cleveland*, 43 Ohio St. 481.

⁵ *Aurora &c. Co. v. Holthouse*, 7 Ind. 59.

the *onus probandi* is on the corporation disputing the validity of the repealing act.¹ Though a charter is repealed by the mere passage of a statute, judgment of ouster can be obtained only in a court of law.² If a charter contains a condition subsequent in defeasance of the franchises, it may be forfeited on the happening of that condition, but the franchises continue if the State does not choose to take advantage of the breach.³

§ 436. The remedies for ultra vires acts.—The modern remedies used to correct the usurpation of corporate franchises, are by *scire facias* where a corporation abuses its power, and by *quo warranto* information where a corporation *de facto* assumes powers which do not belong to it.⁴ The statutory remedy in Vermont, for forfeiting the franchise of a corporation, is by *scire facias* in the name of the State, the common law provision being by implication repealed.⁵ Where a foreign insurance company, having received from the State auditor a certificate under the provisions of the law as to insurance companies, was alleged to be offending against the laws of the State by making more than one kind of insurance, it was decided that *quo warranto*, and not *certiorari*, was the proper manner of inquiring into such charges.⁶ Courts do not favor this means of redressing the abuse of corporate powers, and will refuse to countenance it where there is other

¹ Erie &c. R. Co. v. Casey, 26 Pa. St. 287.

² People v. Hillsdale &c. Co., 23 Wend. 254.

³ Canal Co. v. Railway Co., 4 Gill & J. 1.

⁴ Commonwealth v. United States Bank, 2 Ashm. 349.

⁵ Green v. St. Albans Trust Co., 57 Vt. 340; Vt. Rev. Laws, ch. 72, §§ 1327, 1331.

⁶ State v. Fidelity & Casualty Co., (1889) 77 Iowa, 648. The statutory provisions are as follows: By Code Iowa, § 3216, *certiorari* lies in cases where an inferior officer exercising judicial functions is alleged to have exceeded his proper jurisdiction, or

is otherwise acting illegally, "when in the judgment of the superior court there is no other plain, speedy, and adequate remedy." Code, ch. 6, tit. 20, is designed especially to "test official and corporate rights." Section 3345 provides that a civil action may be brought in the name of the State, *inter alia*, "against any person acting as a corporation within this State, without being authorized by law;" also "against any corporation doing or omitting acts which amount to a forfeiture of their rights and privileges as a corporation, or exercising powers not conferred by law."

ample remedy or the abuse is doubtful.¹ Where the information is to be filed on the relation of some one, leave of the court must first be had. But where the proceedings are instituted by the attorney-general *ex officio* and without any relator, the information is filed as of course, without leave of the court.² It was the early practice of the courts to grant the application for leave to bring the information almost as a matter of course, but the growing frequency of the proceeding induced an examination into the merits of the applications, and led to the exercise of a discretion in the premises which gave rise to the now well settled rule, that the granting of these applications rests in the sound discretion of the court.³ To entitle one to act as relator, he must have some interest in the office or franchise.⁴ The mere interest of a private citizen is not enough to put a private corporation on its defense to the remedy in question.⁵ Though for private and peculiar injury within its scope, it might lie at the relation of an individual, it would not be granted to dissolve a corporation.⁶ Information in the nature of *quo warranto* to oust the defendants from acting as a corporation, and to test the fact of their incorporation, should be filed against the individuals; but if the object is to effect a dissolution of a corporation, or to oust it from some franchise which it is unlawfully exercising, then the information is correctly filed against the corporation.⁷ Information in the nature of *quo warranto*, however, is essentially a civil proceeding, and the burden of proof is upon the complaining party to show that his adversary is illegally in possession of the office.⁸ But if the proceeding against a corporation is founded on an alleged usurpation of power, and is instituted by the State, and not on the relation of a private person, the

¹ *State v. Commercial Bank*, 10 Ohio, 535; *People v. Hillsdale & Co.*, 2 Johns. 190. *v. Centerville Bridge Co.*, 18 Ala. 678; *State v. Fisher*, 28 Vt. 714.

² *Commonwealth v. Waltër*, 83 Pa. St. 105; *State v. Vail*, 53 Mo. 97; *High on Extr. Rem.* § 707.

³ *People v. Waite*, 70 Ill. 25; *Commonwealth v. Arrison*, 15 Serg. & R. 133; *People v. Sweeting*, 2 Johns. 183; *State v. Tehoe*, 7 Rich. 246; *State v. Tolan*, 33 N. J. 195; *State*

⁴ *State v. Vail*, 53 Mo. 97, 109.

⁵ *State v. Paterson & Co.*, 1 Zab. 9.

⁶ *Murphy v. Farmers' Bank*, 20 Pa. St. 415.

⁷ *People v. Rensselaer & Co. R. Co.*, (1836) 15 Wend. 113.

⁸ *State v. Kupferle*, (1869) 44 Mo. 154.

burden is on the defendant to disclaim or justify, and the State is not bound to make affirmative proof. In such case, the burden is upon the respondent to show title, and if the title relied upon in defense be incomplete, the State or "the people" as the case may be are entitled to judgment.¹ If a corporation is shown to have been once in existence, its continuance is presumed until the contrary is shown.² Proceedings of a board of *de facto* directors of a private corporation are presumed to be regular until irregularity is shown; therefore, when acting under a by-law, they remove an officer, it will be presumed that they acted on sufficient grounds, until their action is impeached by proof.³ Judgment of ouster is rendered against individuals for unlawfully assuming to be a corporation, or against a corporation to forfeit its corporate privileges.⁴

§ 437. When the minority can not have recourse to the courts.—Holders of a majority of the stock in a corporation have a right to control it, and the minority can not interfere unless they show some good reason for interference. They must establish by their complaint that they have exhausted all the means within their power to obtain redress for their grievances or corporate action in conformity with their wishes, and that their effort to obtain redress at the hands of the directors and other stockholders has been earnest and faithful.⁵ It is not enough that there may be a doubt as to the authority of the directors, or as to the wisdom of their proceedings. Grievances, real and substantial, must exist, and before an individual stockholder can be heard he must show, as said above, that he has exhausted all means within his reach to obtain within the corporation itself the redress of his grievances, or action in conformity to his wishes.⁶ Before a minority of the stockholders can maintain a bill against the majority there must be shown (1) Some action or threatened action of the directors or trustees which is beyond the authority conferred by the

¹ *People v. Utica Ins. Co.*, 15 Johns. 358; *State v. Harris*, 3 Ark. 570.

² *People v. Manhattan Co.*, 9 Wend. 351, 378.

³ *State v. Kupferle*, (1869) 44 Mo. 154.

⁴ *People v. Rensselaer &c. R. Co.*, (1836) 15 Wend. 113.

⁵ *Alexander v. Searcy*, (1889) 81 Ga. 536.

⁶ *Field, J.*, in *Dimpfell v. Ohio &c. R. Co.*, 110 U. S. 209.

charter or the law under which the company was organized; or (2) Such a fraudulent transaction completed or threatened by them, either among themselves or with some other party or with shareholders, as will result in serious injury to the company or the other shareholders; or (3) That the directors, or a majority of them, are acting for their own interests, in a manner destructive of the company or of the rights of the other shareholders; or (4) That the majority of the stockholders are oppressively and illegally pursuing, in the name of the company, a course in violation of the rights of the other shareholders which can only be restrained by a court of equity; and (5) It must also be made to appear that the complainant made an earnest effort to obtain redress at the hands of the directors and shareholders of the corporation.¹ He must make an earnest, not a simulated effort with the managing body of the corporation to induce remedial action on their part, and this must be made apparent to the court. If time permits or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it. The efforts to induce such action as complainant desires on the part of the directors, and of the shareholders when that is necessary, and the cause of failure in these efforts, should be stated with particularity.² A person who did not own stock at the time of fraudulent transactions complained of, or whose shares have not devolved upon him since by operation of law, can not maintain a suit to have such transactions declared illegal.³

§ 438. *Illegal corporate acts.*— *Ultra vires* acts may, in addition to being beyond the powers of the corporation, be illegal because the corporation is expressly forbidden to do them, or because they are *mala in se* by common law or by statute, or because they are against public policy.⁴ Of course if a corporate contract is illegal in itself it can no more be

¹ Hawes v. Oakland, 104 U. S. 450, 536; Hawes v. Oakland, 104 U. S. 450; Dimpfell v. Ohio &c. R. Co., per Miller, J.

² Hawes v. Oakland, 104 U. S. 450, 110 U. S. 209, per Miller, J.

⁴ Taylor on Corporations, §§ 292-3;
³ Alexander v. Searcy, (1889) 81 Ga. Whitney Arms Co. v. Barlow, 63

enforced by either party, than any other illegal contract. It is thus in case of an agreement to pay for lobbying,¹ and for procuring a government contract.² The illegality should, however, inhere in the very act or contract itself that is sought to be declared illegal.³ In regard to statutory prohibitions of corporate acts the rule is thus stated by an eminent text-writer: "If a statute expressly forbids a corporation to make a certain contract, the contract is void, even though not expressly declared to be so, and is incapable of ratification; and that the contract is void as unlawful may be pleaded by any one to an action founded directly and exclusively on the contract;⁴ unless (1) the statute expressly states what the consequences of violating it shall be, and those consequences are other than that the contract shall be void;⁵ or (2) unless the

N. Y. 62, 68; s. c. 20 Am. Rep. 504; *Bissell v. Michigan &c. Ry. Co.*, 22 N. Y. 264.

¹ *Marshall v. Baltimore &c. Ry. Co.*, 16 How. 314. Promoting a bill in parliament for additional powers seems to be regarded in the same way. *Maunsell v. Midland &c. Ry. Co.*, 32 L. J. Ch. 513; *Stevens v. South Devon Ry. Co.*, 20 L. J. Ch. 491; *East Anglian Ry. Co. v. Eastern Counties Ry. Co.*, 11 C. B. 775; *Munt v. Shrewsbury &c. Ry. Co.*, 20 L. J. Ch. 169; *Caledonian Ry. Co. v. Solway &c. Ry. Co.*, 49 L. T. 526; s. c. 13 Beav. 1; *Wood's Ry. Law*, 483. And it has even been held that an agreement to pay the expenses of an application to parliament for enlarged powers is not merely *ultra vires*, but also illegal as being against public policy. *MacGregor v. Dover &c. Ry. Co.*, 18 Q. B. 618, 632. But *Browne & Theobald's Ry. Law*, 96, holds that apart from any question of the application of its funds, a company may promote or oppose a bill in parliament, and cites *In re London &c. Ry. Co.*, (1869) L. R. 5 Ch. Ap. 671; *Steele v. N. Met. Ry. Co.*, 2 Ch. 237;

Telford v. Metropolitan Board of Works, 13 Eq. 514; *Heathcote v. North Staffordshire Ry. Co.*, 2 Macn. & G. 109; 20 L. J. Ch. 82; *Attorney-General v. Manchester &c. Ry. Co.*, 1 R. C. 436; *Lancaster &c. Ry. Co. v. North Western Ry. Co.*, 2 Kay & F. 293. The English cases seem to hold also, however, that a company may devote its funds to oppose a bill, the passing of which would endanger its prosperity. *Attorney-General v. Brecon*, 10 Ch. Div. 204; *Attorney-General v. Eastlake*, 11 H. 205; *Attorney-General v. Norwich*, 2 Mylne & C. 406; *Bright v. North*, 2 Phill. Ch. 216; *Attorney-General v. Andrews*, 2 Macn. & G. 225. See *Regina v. White*, 14 Q. B. Div. 358; *Browne & Theobald's Ry. Law*, 95.

² *Tool Co. v. Norris*, 2 Wall. 45.

³ *Orchards v. Hughes*, 1 Wall. 73; *Atlas National Bank v. Savery*, 127 Mass. 75. See *Taylor on Corporations*, § 293.

⁴ *Taylor on Corporations*, § 297; *In re Jaycox*, 12 Blatchf. 209; *New York &c. Co. v. Helmer*, 77 N. Y. 64; *Utica Ins. Co. v. Scott*, 19 Johns. 1.

⁵ *Taylor on Corporations*, § 299;

statutory prohibition was evidently imposed for the protection of a certain class of persons who alone may take advantage of it;¹ or (3) unless to adjudge the contract void and incapable of forming the basis of a right of action would clearly frustrate the evident purposes of the prohibition itself."² The rule applies, according to the same learned author, where a statutory prohibition is not express, but arises only by implication from the charter, or enabling statute of the corporation; the contract will not be held void when such a construction would defeat the intention of the statute.³ Lastly, an act done by a corporation with public duties to perform which is plainly unauthorized by its constitution may readily be held by the courts to be illegal as against public policy. Such acts are those of the consolidation, lease and sale of transportation, gas, and other *quasi*-public companies. These, especially, as well as all illegal acts, seem frequently to differ but in degree from *ultra vires* acts. One of the chief grounds for declaring them to be *ultra vires* is the injury to the public occasioned thereby.⁴

§ 439. The same subject continued.—The mere knowledge on the part of the corporation that the other party is going to use the proceeds of the contract for some illegal purpose, does not render the contract void so far as it is concerned, provided it does not participate in the illegal under-

Pratt v. Short, 79 N. Y. 437, 445; s. c. 35 Am. Rep. 531; Lister v. Howard Bank, 33 Md. 558; Robinson v. Bland, 2 Burr. 1077.

¹ Taylor on Corporations, § 300, citing Beecher v. Marquette &c. Co., 45 Mich. 103, 108; Green v. Kemp, 13 Mass. 515; s. c. 7 Am. Dec. 169. Cf. Johnson v. Underhill, 52 N. Y. 203; Greenpoint Sugar Co. v. Whittin, 69 N. Y. 328.

² Taylor on Corporations, § 301, citing Gold Mining Co. v. National Bank, 96 U. S. 640; Duncomb v. New York &c. R. Co., 84 N. Y. 190; Union &c. Manuf. Co. v. Rocky Mountains National Bank, 2 Colo. 248; Allen v. First National Bank,

23 Ohio St. 97; Farmington Savings Bank v. Fall, 71 Me. 49; Lester v. Howard Bank, 33 Md. 558; Richmond Bank v. Robinson, 42 Me. 589.

³ Taylor on Corporations, § 302; National Bank v. Whitney, 103 U. S. 99, reversing Crocker v. Whitney, 71 N. Y. 161; National Bank v. Matthews, 98 U. S. 621, 626, *et seq.*; Oldham v. First National Bank, 85 N. C. 240; Thornton v. National Exchange Bank, 71 Mo. 221; Graham v. National Bank, 32 N. J. Eq. 804; Winton v. Little, 94 Pa. St. 64.

⁴ Taylor on Corporations, § 305; Burbank v. Jefferson City &c. Co., 35 La. Ann. 444; New Haven &c. Co. v. Hayden, 107 Mass. 525.

taking.¹ It may be laid down as the rule, that the agreement must be to do or to further some illegal or immoral purpose, or some purpose in violation of public policy. The element that destroys the validity of the agreement is the purpose by the agreement to effect the forbidden end, else the consideration for the promise must be to do an illegal act. If this were not the rule, then a contract might be declared void as against public policy or public law, that does not stipulate for the violation of the one or the other.² When a corporation makes a prohibited contract, while executory on both sides, it is binding on neither; and if executed on either side the courts will refuse to lend any aid to the enforcement by the other; subject, however, to this just exception, that if the charter clearly intended the contract to be illegal as to the corporation only, and not as to the other party, it may be enforced against, though not by the corporation.³ An illegal corporate act can not be ratified nor made valid even by the unanimous consent of the stockholders.⁴ Nor can the doctrine of estoppel be invoked to bind a corporation to a contract forbidden by law.⁵

¹ Taylor on Corporations, § 293; ⁴ Thomas v. The Railroad, 101 U. S. Puryear v. McGavock, (1871) 9 70, and authorities there reviewed; Heisk. 461; Jones v. Planters' Bank, Salem Mill-Dam Co. v. Ropes, 6 Pick. (1872) 9 Heisk. 455. 23, 32; Riche v. Ashbury Railway

² Puryear v. McGavock, (1871) 9 Carriage &c. Co., L. R. 7 H. L. 653. Heisk. 461, quoting Naff v. Crawford, 1 Heisk. 116. ⁵ In re Comstock, 3 Sawy. 218; Kent v. Quicksilver Mining Co., 78

³ "Ultra Vires," by G. H. Wald, 6 N. Y. 159, 185; Ogdensburgh &c. Cent. L. J. 5, citing Oneida Bank v. R. Co. v. Vermont &c. R. Co., 4 Hun, Ontario Bank, 21 N. Y. 490; Tracy 268. v. Talmadge, 14 N. Y. 162.

CHAPTER XXIII.

TORTS AND CRIMES.

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§ 440. **Introductory.**—Corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application. An action may be maintained against a corporation for its malicious or negligent torts, however foreign they may be to the objects of its creation or beyond its granted powers.¹ By a natural extension of the rule, a private business corporation which continues its corporate business in its corporate name after the time fixed by its charter for its duration has expired, can be sued and made liable as a corporation *de facto* for a tort committed by it after its charter has expired.² Notwithstanding the doubts and technical refinements formerly entertained in considering the liability of corporations and the necessity of that liability resting upon some act or instrument sanctioned or attested by the corporate seal, it is now universally conceded that corporations are

¹First Nat. Bank v. Graham, 100 U. S. 699; Philadelphia &c. R. Co. v. Quigley, 21 How. 209; Alexander v. Relfe, 74 Mo. 495.

²Miller v. Newburg Orrel Coal Co., (1888) 31 W. Va. 836; s. c. 13 Am. St. Rep. 903, a case of death from a coal mine explosion.

liable for their torts, and that this liability may be enforced in the same manner as if the wrong complained of had been committed by a natural person.¹ One court has said that it is not true that a corporation has no mind. Its mind is the joint product of the mind of its officers and directory in a united organization; and in point of fact, corporations bring into their service the highest order of ability and the best executive talent in the country.² The doctrine that a corporation having no soul can not be actuated by a malicious intention is more quaint than substantial.³ The objection that indictment requires appearance at the bar and that a corporation, being an incorporeal entity, can not comply with this rule, is also futile, since its appearance may be entered by attorney.⁴ In an old case where the master and wardens of a company were cited into the spiritual court by their proper names with the addition of their offices in the company, and the objection was raised that they were cited by their proper names, but in their political capacity, the court very quaintly observed that "if they stood out they might be laid by the heels in their natural capacity."⁵ Exemplary damages may be recovered against corporations for the wrongful acts of their servants and agents done in the course of their employment in all cases and to the same extent that natural persons committing like wrongs would be held liable.⁶

§ 441. State of the authorities.—It has been said that a corporation is created by law for certain beneficial purposes. They can not commit a crime or misdemeanor by any positive, affirmative act, or incite others to do so, as a corporation. While assembled at a corporate meeting, a majority may, by

¹ Cooley on Torts, 120; Peebles v. Patapasco Guano Co., (1877) 77 N. C. 233; Venas v. Merchants' Ins. Co., 27 La. Ann. 367; Hays v. Houston R. Co., 46 Tex. 272; Lee v. Village of Sandy Hill, (1869) 40 N. Y. 442; Smith v. Birmingham Gas Co., 1 A. & E. 526; Mound v. Monmouthshire Canal Co., 2 Dowl. N. S. 113; Riddle v. Proprietors, (1810) 7 Mass. 169; s. c. 5 Am. Dec. 35; Lyman v. White River Bridge Co., 2 Aik. 255.

² Copley v. Grover & Co., 2 Woods, 494, following Philadelphia & C. R. Co. v. Quigley, (1858) 21 How. 202.

³ Green v. London & Co., 7 C. B. N. S. 290.

⁴ Queen v. Birmingham & Co. Ry. Co., 2 Gale & D. 243.

⁵ Rex v. Thursfield, Skin. 27.

⁶ Wheeler & Co. Manuf. Co. v. Boyce, (1887) 36 Kan. 350; Lake Erie & Co. R. Co. v. Acres, (1886) 108 Ind. 548.

a vote entered upon their records, require an agent to commit a battery, but if he does so, it can not be regarded as a corporate act for which the corporation can be indicted. It would be stepping aside altogether from their corporate powers. If indictable as a corporation, for an offense thus incited by them, the innocent dissenting minority become equally amenable to punishment with the guilty majority. Such only as take part in the measure should be prosecuted as individuals, or as aiding and abetting or procuring an offense to be committed, according to its character or magnitude. It is a doctrine then in conformity with the demands of justice, and a proper distinction between the innocent and the guilty, that when a crime or misdemeanor is committed under color of corporate authority, the individuals acting in the business and not the corporation should be indicted.¹ That case, however, was first disregarded in its own State,² and then expressly overruled.³ The whole course of the authorities,⁴ has been said to show that an action for a wrong will lie against a corporation, where the thing complained of is done within the scope of its incorporation and is one which would constitute an actionable wrong if done by an individual.⁵ This statement, however, is misleading, for in England for want of an express decision of the House of Lords, the point must be deemed still unsettled, although the preponderance of authority would seem to be in favor of the liability of corporations for torts involving wrongful intents.⁶

¹ *State v. Great Works Mill Co.*, 20 Me. 41, followed by *State v. Ohio &c. R. Co.*, 23 Ind. 362.

² *State v. Freeport*, 43 Me. 198; *State v. Portland &c. R. Co.*, 57 Me. 402.

³ *State v. Portland*, (1883) 74 Me. 268, citing, as having overruled the same case, *State v. Vermont &c. R. Co.*, 27 Vt. 103, and *State v. Morris &c. R. Co.*, 23 N. J. L. 360; and also *Commonwealth v. Proprietors*, 2 Gray, 345; *People v. Albany*, 11 Wend. 539; s. c. 27 Am. Dec. 99; *Mayor v. Furze*, 3 Hill, 615.

⁴ From *Yarborough v. Bank of*

England, 16 East, 6, down to *Whitfield v. Southeastern Ry.*, El. B. & E. 115.

⁵ *Green v. London &c. Co.*, 7 C. B. N. S. 290.

⁶ As the law stands in England, we have the express decision of one learned judge, (Alderson, B., in *Stevens v. Midland &c. Ry.*, 10 Ex. 352) that actions of tort involving a wrongful intent will not lie against corporations, supported by the extrajudicial opinions expressed by learned judges of the House of Lords in at least three different cases. On the other hand, we have express decis-

§ 442. **Respondeat superior.**—A corporation is liable for the acts of its agents and servants while engaged in the business of their principal, in the same manner and to the same extent that an individual is liable under like circumstances.¹ It would be an abandonment of the well-established principle of *respondeat superior* to hold that the agents of a corporation, in the discharge of their official duties, might be guilty of malicious torts and yet permit the corporation to shield itself from responsibility by relying on its soulless character.² Accordingly, as above stated, a corporation is liable *civiliter* for torts committed by its servants, or precisely as a natural person; and that it is liable as a natural person for the acts of its agents done by its authority, express or implied, though there be neither a written appointment under seal, nor a vote of the corporation constituting the agency or authorizing the act.³ Conversely, a corporation is not to be held liable for the malicious acts of its agents under circumstances which would not render a natural person liable. Accordingly, the unauthorized malicious acts of its agents will not render a corporation liable for exemplary damages unless the acts be ratified by it with full knowledge of the facts,⁴ or unless the agents acted in a spirit of mischief or of criminal indifference to civil obligations.⁵

ions of several courts of appeal in at least five cases, that actions of this nature will lie against corporations. Monographic Note by Louis M. Greeley, (1886) 25 Am. L. Reg. 765.

¹ First Nat. Bank v. Graham, 100 U. S. 699; Merchants' Bank v. State Bank, 10 Wall. 645. Why, it may be well asked, should not the rule be the same substantially in reference to corporations and their agents as between individuals and their servants? The vast multiplication of corporations, and the variety of interests affected thereby, have demanded and suggested a course of proceeding adapted to the ends of justice, and in the first application of wholesome rules appropriate remedies have been gradually unfolded, as well in enforcing the rights of cor-

porations in "suing" as in holding them amenable to "being sued." Main v. North Eastern Ry. Co., 12 Rich. 82.

² Wheless v. Second Nat. Bank, 1 Baxt. 469.

³ Denver &c. Ry. v. Harris, (1886) 122 U. S. 597, approving State v. Morris &c. R. Co., 23 N. J. 369, and citing Salt Lake City v. Hollister, 118 U. S. 256; New Jersey &c. Co. v. Brockett, 121 U. S. 637; National Bank v. Graham, 100 U. S. 699.

⁴ Gulf &c. R. Co. v. Moore, (1887) 69 Tex. 157; Hays v. Houston &c. R. Co., (1876) 46 Tex. 272; Galveston &c. R. Co. v. Donahoe, (1882) 56 Tex. 163.

⁵ Denver &c. Ry. v. Harris, (1886) 122 U. S. 609; Philadelphia &c. R.

§ 443. **Express authority need not be shown.**—It is not only in cases where a prosecution has been instituted by the command of the corporation acting through its directors, that it may be sued for malicious prosecution.¹ In order to maintain an action for malicious prosecution against a corporation, it is not necessary to show an express authority from the corporation to carry it on, but it is sufficient to show that the prosecution was commenced and carried on by agents of the corporation in its interest and for its benefit, and that they acted within the scope of the authority conferred upon them by the corporation.² Thus a corporation may be held liable for malicious prosecution instituted by a general agent,³ or even by his subordinate agent.⁴ In such cases the corporation and servant can be made joint defendants.⁵

§ 444. **Scope of authority.**—A corporation is responsible for the tortious acts of its agent done in the line of his employment, and in the execution of the authority conferred, although it did not directly authorize the wrong action or subsequently ratify it.⁶ The true test of the liability of the principal in such cases is to ascertain whether, in committing the act, for example fraud, the agent was acting in the business of his principal. If he was engaged in the course of his employment, then parties injured by his misconduct or fraud can resort for redress to the persons who clothed him with the power to act in their behalf, and who have received the benefits resulting from his agency.⁷ Thus in an action for damages for malicious prosecution, wherein a corporation and its general manager were joined as parties defendant, the corporation demurred on the ground that it appeared that the acts complained of were those of the gen-

Co. v. Quigley, 21 How. 202; *Milwaukee &c. Ry. Co. v. Arms*, 91 U. S. 492; *Missouri &c. Ry. Co. v. Humes*, 115 U. S. 521; *Barry v. Edwards*, 116 U. S. 562.

¹ *Boogher v. Life Assoc.*, (1882) 75 Mo. 319; s. c. 42 Am. Rep. 413.

² *Boogher v. Life Assoc.*, (1882) 75 Mo. 325; s. c. 42 Am. Rep. 413; approving *Fenton v. Machine Co.*, 9 Phila. 189.

³ *Turner v. Phoenix Ins. Co.*, (1884)

55 Mich. 236; *Hussey v. King*, (1887) 98 N. C. 34; s. c. 2 Am. St. Rep. 312.

⁴ *Moore v. Metropolitan Ry.*, (1872) L. R. 8 Q. B. 36. Cf. *Wheeler &c. Manuf. Co. v. Boyce*, (1887) 36 Kan. 350.

⁵ *Hussey v. Norfolk Southern R. Co. & King*, (1887) 98 N. C. 34; s. c. 2 Am. St. Rep. 312.

⁶ *Wheeler &c. Manuf. Co. v. Boyce*, (1887) 36 Kan. 350.

⁷ *Fogg v. Griffen*, 2 Allen, 1.

eral manager, and not done within the scope of his authority or duty, nor in the service of the company. But it was held that although the acts complained of were *ultra vires*, and could not be within the scope of the power of the company or its agents, the company was none the less liable therefor.¹ It has, on the other hand, been held that the agent must be shown to have express authority for his act or that it must have been ratified.²

§ 445. Whether a corporation may act maliciously.—It has been argued, that inasmuch as a malicious motive and a criminal intent can not be attributed to a corporation in its corporate capacity, it is not indictable for those crimes of which malice or some specific criminal intent is an essential ingredient.³ A distinction is drawn between acts injurious in their effects, and for which the actor is liable without regard to the motive which prompted them, and conduct, the character of which depends upon the motive, and which apart from such a motive can not be made the ground of legal responsibility. If this distinction is well taken, it would follow that since a corporation, as such, is incapable of malice it is not liable for a malicious prosecution. And there are a few authorities, both English and American, which seem to sustain the idea that an action for a malicious prosecution can not be maintained against a corporation;⁴ among which is a vigorous modern re-statement of the old rule by Lord Bramwell which is well worth consideration.⁵ Although in an earlier

¹ *Hussey v. King*, (1887) 98 N. C. 34; s. c. 2 Am. St. Rep. 312.

² *Carter v. Howe Machine Co.*, (1878) 51 Md. 290.

³ *Owsley v. Montgomery &c. R. Co.*, 37 Ala. 560.

⁴ *Owsley v. Montgomery &c. R. Co.*, 37 Ala. 560; *Childs v. Bank*, 17 Mo. 213; *Stephens v. Midland &c. Co.*, 10 Ex. 352; *McLellan v. Cumberland Bank*, 24 Me. 566. These American cases have been overruled: *vide infra*, p. 734, n. 3.

⁵ *Abrath v. Northeastern Ry. Co.*, (1883) 11 Q. B. Div. 440; s. c. 25 Am. L. Reg. 759, where he says: "I

am of opinion that no action for a malicious prosecution will lie against a corporation. I take this opportunity of saying that as directly and peremptorily as I possibly can; and I think the reasoning is demonstrative. To maintain an action for malicious prosecution, it must be shown that there was an absence of reasonable and probable cause, and that there was malice in some indirect and illegitimate motive. If the whole body of shareholders were to meet and in so many words say, 'prosecute so and so, not because we believe him guilty, but because

case in England it had been said after a review of the authorities that the *ratio decidendi* of the rule,¹ that a corporation can not be guilty of a tort involving intention, had never been followed, and that the court was accordingly at liberty to decide according to what it conceived to be the true view of the law, to wit, that a corporation could be held liable for malicious prosecution.² The leading American cases holding that malicious prosecution does not lie against a corporation because it can not be guilty of a malicious intent, have been overruled.³

§ 446. Effect of consolidation upon corporate liability.—Statutes authorizing consolidation frequently provide for the continuance of the separate existence of the old companies, so far as outstanding obligations to third persons are concerned, and these provisions include obligations arising out of torts.⁴

it will be for our interest to do it,' no action would lie against the corporation, though it would lie against the shareholders who had given such an unbecoming order. If the directors even, by resolution at their board or by order under the common seal of the company (I am putting the case plainly in order that there may be no mistake about it), were maliciously, with a view of putting down a solicitor who had assisted others to get damages against them, to order a prosecution against that man, if they did it from an indirect and improper motive, no action would lie against the corporation, because the act on the part of the directors would be *ultra vires*; they would have no authority to do it. They are only agents for the company; the company acts by them, and they have no authority to bind the company by ordering a malicious prosecution. I say, therefore, that no action lies, even if you assume the strongest case, namely, that of the very shareholders directing it, or the very di-

rectors ordering it; because it is impossible that a corporation can have malice or motive; and it is perfectly immaterial that some subordinate officer or individual or individuals of the company have such malice or motive."

¹ Referring to *Alderson B.*, in *Stevens v. Midland &c. Ry.*, 10 Ex. 352.

² *Edwards v. Midland Ry.*, (1880) 50 L. J. Q. B. 281. See also *Henderson v. Midland Ry. Co.*, 20 W. R. 23.

³ *Childs v. Bank of Missouri*, 17 Mo. 213; followed only with qualification as to torts within the scope of an agent's authority by *Gillet v. Missouri &c. Ry. Co.*, 55 Mo. 315; and *Owsley v. Montgomery &c. R. Co.*, 37 Ala. 560, in effect overruled by *South &c. R. Co. v. Chappell*, 61 Ala. 529, and by *Boogher v. Life Assoc.*, (1882) 75 Mo. 319; and *Jordan v. Alabama &c. R. Co.*, 74 Ala. 85, respectively.

⁴ *Warren v. Mobile &c. R. Co.*, 49 Ala. 582; *Selma &c. R. Co. v. Harbin*, 45 Ga. 706.

Where by an act of the legislature one railroad company is authorized to purchase and another company to sell its rights, franchises and property, and thereupon the former corporation is to be subject to all the duties, liabilities, obligations and restrictions to which the latter corporation was subject, upon the completion of the transaction the purchasing corporation becomes liable in an action for damage occasioned by the prior neglect of the purchased corporation.¹ Where the language of the enabling statute is broad enough to place the defendant in all respects in the position of the other corporation, upon the conveyance and assignment provided for, it is equivalent to an amalgamation of the two; all the franchises, privileges and powers are transferred, without reservation; not merely the franchise to own and manage a railroad, but the franchise of being a body politic, with rights of succession, of acquiring, holding and conveying property, and of suing and being sued by its corporate name. It puts out of the reach of creditors all property liable to attachment to satisfy claims, either in contract or tort. It practically terminates the corporate existence of the selling corporation, except perhaps so far as such existence may be necessary in order to hold and distribute the consideration received for the sale, or to meet the requirements of statutes which prolong the life of all corporations after dissolution, for the purpose of enabling them to close their concerns. It operates as a dissolution of the corporation by force of the statute and of the assent manifested by the sale. It would be a very narrow construction to hold that when a statute subjects the purchasing corporation to all the duties, liabilities, obligations and restrictions of the other, it only intended to impose those obligations which the corporation owed the public under its charter and the laws of the commonwealth, and that the property transferred was only that by which it served the public in the exercise

¹ *New Bedford R. Co. v. Old enson v. Texas &c. R. Co.*, 42 Tex. 162; *Colony R. Co.*, (1876) 120 Mass. 397; *Railroad Co. v. Hutchins*, 37 Ohio St. Coggin *v. Central R. Co.*, 62 Ga. 685; 282; *Chicago &c. R. Co. v. Moffitt*, s. c. 35 Am. Rep. 132; *Texas &c. R. 75 Ill. 524. See Columbus &c. R. Co. v. Murphy*, 46 Tex. 356; s. c. 26 Am. Rep. 272; *St. Louis &c. R. Co. v. Marker*, 41 Ark. 542; *Warren v. Houston &c. R. Co. v. Shirley*, 54 Mobile &c. R. Co., 49 Ala. 582; *Steph-* Tex. 125.

of its franchise. In the absence of express provision it is not to be inferred that it is the intention of the enabling act to impair claims of third parties for existing liabilities, or to shorten the time within which the remedy must be pursued. The question is not whether the statute compels the creditor to accept the defendant corporation as a new debtor against his will, or an injured person to resort to a stranger for satisfaction, but whether it empowers the creditor or the person injured to resort, if he chooses, in the first instance, to the corporation which, by the terms of the statute, is made liable to him. It is held that it does, and that the privity necessary to support an action is created by the statute and the purchase and conveyance under it.¹ And where two railroad companies have been consolidated, an action for damages also lies against one of the old companies for personal injuries causing death and which resulted from its own wrongful act.² But of course no liability is imposed upon the companies entering into a consolidation for the torts of the new organization. For all purposes except the settlement of their affairs they are considered as dissolved.³ The consolidated company can not plead in an action against it in tort that the consolidation was not authorized by law.⁴

§ 447. False imprisonment.—Even cases that deny the liability of a corporation for malicious prosecution admit their liability for false imprisonment.⁵ A railway company, though it be a corporation, is liable in an action for false imprisonment, if that imprisonment be committed by the authority of

¹ *New Bedford R. Co. v. Old Colony R. Co.*, (1876) 120 Mass. 397.

² *Warren v. Mobile &c. R. Co.*, 49 Ala. 582; *Miller v. Steamship Co.*, 67 Barb. 285.

³ *Beach on Railways*, § 559. And a judgment against one of the original companies for a tort committed by the consolidated company being void, no execution can issue thereon even against the consolidated company. *Gray v. National Steamship Co.*, 115 U. S. 116, 121.

⁴ *Racine &c. R. Co. v. Farmers'*

Loan & T. Co., 49 Ill. 331, 347; s. c. 95 Am. Dec. 595; *Bissell v. Michigan Southern &c. R. Co.*, 22 N. Y. 258, 263; *Reynolds v. Myers*, 51 Vt. 444, 455; *Callender v. Painesville &c. R. Co.*, 11 Ohio St. 516. *Cf. Carey v. Cincinnati & Chicago R.*, (1857) 5 Iowa, 357.

⁵ *Owsley v. Montgomery &c. R. Co.*, (1861) 37 Ala. 560. The court said that the same reasoning that sustained cases in trespass against corporations applied to trespass for false imprisonment.

the company; and it is not necessary that that authority be under seal.¹ The malicious and oppressive conduct of an agent of a corporation and his wanton and reckless disregard of a person's right in procuring his false imprisonment may subject the company to damages.² And in an aggravated case it will be liable in punitive damages.³

§ 448. Fraud.—A corporation may be guilty of fraud, the fraud of its officers and agents in the course of corporate dealings being in law the fraud of the corporation.⁴ Thus it is liable in an action of deceit, for a fraudulent misrepresentation or concealment by its servants or agents,⁵ while acting within the scope of their employment. And in this connection the words "scope of authority or employment" are used

¹ *Goff v. Great Northern Ry.*, 3 El. & El. 672; *Eastern Counties Ry. Co. v. Broom*, 6 Ex. 314.

² *Wheeler & c. Manuf. Co. v. Boyce*, (1887) 38 Kan. 356.

³ *Wheeler & c. Manuf. Co. v. Boyce*, (1887) 36 Kan. 350. In this case the plaintiff below was thrust into a jail at the instance of the agent of the defendant below, without warning or trial, when there was no civil or criminal suit pending against him, and kept there for ten days with seventeen or eighteen prisoners who were either charged with or convicted of crime. The sewing machine sought to be recovered from his wife had been paid for, and belonged absolutely to her; and defendants with knowledge of this fact undertook to compel the payment of money not due, or the recovery of property which they did not own, by the arrest and incarceration of the plaintiff without cause and in a manner that was clearly illegal. Apart from the loss of time, and interruption to his business, as well as the humiliation and indignity suffered by him by being thrust into jail upon a false charge, it appears

that the confinement resulted in his sickness; "and when we consider the malicious and oppressive conduct of the defendant, and that the case is one which calls for the infliction of exemplary or punitive damages, we can only conclude that the verdict of one thousand dollars in favor of the plaintiff was fully justified, if not too small. We say without hesitation, that an award of a larger amount would not have been disturbed on the ground that it was excessive."

⁴ *Craigis v. Hadley*, (1885) 99 N. Y. 131, where receiving a deposit just before a bank was going to close its doors, when its officers must all have known of its hopeless insolvency and after its paper had gone to protest, was held to be the fraud of the bank.

⁵ *National Bank v. Graham*, 101 U. S. 699; *Butler v. Watkins*, 13 Wall. 456; *New York & c. R. Co. v. Schuyler*, 34 N. Y. 30; *Works v. Barber*, 106 Pa. St. 125; *Western & c. R. Co. v. Franklin Bank*, 60 Md. 36; *Lamm v. Port Deposit & c. Assoc.*, 49 Md. 233; *Peebles v. Patapsco Guano Co.*, 77 N. C. 233.

in a broad and comprehensive sense.¹ Thus an action of deceit will lie against an incorporated bank for the fraudulent misrepresentation of its cashier, made while acting within the scope of his authority, and for the interests of his employers.² So such an action of deceit lies against a joint-stock banking company for the fraudulent misrepresentation of its manager.³ Where a person has been drawn into a contract to purchase shares belonging to a company by fraudulent misrepresentations of the directors, and the directors, in the name of the company, seek to enforce that contract, or the person who has been deceived institutes a suit against the company to rescind it on the ground of fraud, the misrepresentations are imputable to the company, and the purchaser can not be held to his contract, because a company can not retain any benefit which they have obtained through the fraud of their agents.⁴ There is an English decision that if the person who has been induced to purchase shares by fraud of the directors, instead of seeking to set aside the contract prefers to bring an action for damages for the deceit, it can not be maintained against the company, but only against the directors personally.⁵ This, however, has been practically overruled in a case where the rule was stated to be that the remedy against a company in respect of the fraud of its agents is not to be confined to cases where the fraud is part of a contract which can be rescinded so as to place the parties in *statu quo*. The action of deceit was held to be maintainable, the fraud of the agent being treated as the fraud of the principal; the court saying that they saw no valid reason for exempting incorporated more than unincorporated principals from this form of action;⁶ that while, strictly speaking, a corporation can not of itself be guilty of fraud, yet since its objects can only be accomplished through the agency of individuals, there can be no doubt that conduct on the part of an agent which would

¹ Mackey v. Commercial Bank, L. R. 5 P. C. 394, distinguishing *dicta* in Western Bank v. Addie, L. R. 1 Sc. App. 145.

² Mackey v. Commercial Bank, L. R. 5 P. C. 394.

³ Barwick v. English Joint Stock Bank, (1867) L. R. 2 Ex. 259.

⁴ Western Bank v. Addie, L. R. 1 Sc. App. 145. *Vide infra*, §§ 527-530.

⁵ Western Bank v. Addie, L. R. 1 Sc. App. 145. *Cf.* New Brunswick &c. Ry. Co. v. Conybeare, 9 H. L. Cas. 725.

⁶ Mackey v. Commercial Bank, (1874) L. R. 5 P. C. 414.

subject a natural person to liability will render a corporate principal equally liable.¹

§ 449. **Injuries to the person.**—A private corporation may be made a defendant in an action to recover damages for personal injuries,² whether to its own employees and servants,³ or to strangers,⁴ or to persons to whom it owes peculiar obligations growing out of the relation between passenger and carrier.⁵ But the distinction between the liabilities of private and public corporations is of importance in this connection.⁶ For example it has been held that a "House of Refuge," founded for the care, custody, and reformation of convict, vagrant, or incorrigible youths, being a charitable organization, is not liable for damages for an assault by one of its officers on an inmate.⁷ This distinction was involved in a recent case in Massachusetts in which an organization for discovering and preventing fires and saving life and property was held to be a private and not a charitable corporation, and accordingly liable for any injuries caused by the negligence of its servants.⁸

¹ Mackey v. Commercial Bank, (1874) L. R. 5 P. C. 414; Ranger v. Great Western Ry. Co., 5 H. L. C. 86.

² Moore v. Fitchburg R. Co., 4 Gray, 465; Hanson v. European &c. Ry. Co., 62 Me. 84; s. c. 16 Am. Rep. 404; McKinley v. Chicago &c. R. Co., 44 Iowa, 314; s. c. 24 Am. Rep. 748; Passenger R. Co. v. Young, 21 Ohio St. 518; s. c. 8 Am. Rep. 78; Eastern Counties Ry. Co. v. Broom, 6 Ex. 314. See also § 462, *infra*.

³ Beach on Railways, § 971; Beach on Contributory Negligence, §§ 371-373.

⁴ Beach on Railways, § 970.

⁵ Beach on Railways, §§ 972 *et seq.*

⁶ Insurance Patrol v. Boyd, 120 Pa. St. 624; Newcomb v. Boston Protective Department, (Mass. 1890) 8 Ry. & Corp. L. J. 65.

⁷ Perry v. House of Refuge, 63 Md. 20; s. c. 52 Am. Rep. 495.

⁸ Newcomb v. Boston Protective Department, (Mass. 1890) 8 Ry. & Corp. L. J. 65. In this case the defendant was incorporated by Stat. Mass. 1874, ch. 61, which limits its membership to officers and agents of fire insurance companies in the city of Boston. The act gives the corporation power to maintain a corps of men and suitable apparatus for discovering and preventing fires and saving life and property, and its employees are given the right to enter buildings and assist at fires, and have certain rights in the streets, subordinate to those of the fire department. The expenses of the corporation are paid by assessments on all fire insurance agencies or organizations doing business in Boston, which are required to make a report of the aggregate amount of premiums received by each, and a penalty is provided for a failure to make

§ 450. The same subject continued — Joinder of parties. A corporation and its agents may be joined as defendants in an action to recover damages resulting from an assault and battery committed by the latter, under the previous authority or subsequent ratification of the former;¹ although there is a case holding that an action for assault and battery will not lie against a corporation joined as defendant in such an action. If so joined, the writ is abatable as to all.²

§ 451. Libel.— A corporation may be held civilly responsible for libel.³ Thus an action for libel is maintainable against a joint-stock company, or corporation which publishes a newspaper in which the libel is maintained.⁴ A railroad corporation is liable in tort for the publication of a libel where a libelous extract from a newspaper indicating that a neighboring ticket broker was not a reliable person from

report. The corporation has no capital stock, and has no income except from the assessments; and in levying assessments, no distinction is made between companies that are members of the corporation and those which are not. The evidence was that no distinction was made at fires in protecting insured property and that which was not insured, and that it would be impracticable to make a distinction. And, as stated in the text, it was held that the defendant was a private and not a charitable corporation, and liable for the negligence of its servants. "The defendant," said the court, "places great reliance upon Insurance Patrol v. Boyd, 120 Pa. St. 624, which somewhat resembles the case at bar. But in that case membership in the corporation was open to everybody, and the expenses were wholly paid by voluntary contributions."

¹ Moore v. Fitchburg R. Co., 4 Gray, 465; Hewett v. Swift, 3 Allen, 420; Pennsylvania R. Co. v. Vandiver, 42 Pa. St. 365; Eastern Counties Ry. Co. v. Broom, 6 W. H. & G. 314.

² Orr v. Bank of the United States, (1821) 1 Ohio, 36; s. c. 13 Am. Dec. 588. This case gives a fair statement of certain obsolete legal principles regarding the law of corporations and the reasons upon which they were supposed to be founded. The case was followed in Foote v. City of Cincinnati, 9 Ohio, 31, but is inconsistent with Atlantic & C. R. Co. v. Dunn, 19 Ohio St. 162, and Passenger R. Co. v. Young, 21 Ohio St. 518.

³ Missouri Pac. Ry. Co. v. Richmond, (1881) 73 Tex. 568; Bacon v. Michigan & C. R. Co., (1884) 55 Mich. 224; Philadelphia & C. R. Co. v. Quigley, 21 How. 202; State v. Atchison, 8 Lea, 729; s. c. 31 Am. Rep. 663; Fogg v. Boston & C. R. Co., (1839) 148 Mass. 513; s. c. 12 Am. St. Rep. 583; Samuels v. Evening Mail Assoc., 75 N. Y. 604, reversing s. c. 9 Hun, 288; Whitfield v. South Eastern Ry. Co., El. B. & E. 115.

⁴ Van Aernam v. Bleistein, 102 N. Y. 355; Evening Journal Assoc. v. McDermott, 44 N. J. L. 480; s. c. 43 Am. Rep. 392.

whom to buy tickets, was kept posted forty days in a conspicuous place in an office of the road arranged especially for the sale and advertising of railroad tickets, under the immediate charge of an employee, and the general passenger agent, although notified, had refused to interfere with the posting.¹ So where a railroad corporation by its superintendent prepared a "discharge list" wherein a criminal act was assigned as the reason for the discharge of an employee, and sent the list to all of its agents who had power to employ men for the company, this was considered to be a sufficient publication to support an action for libel.² A necessary correlative to the principle of the exercise of corporate powers and faculties by legal representatives, is the recognition of corporate responsibility for the acts of those representatives.³ To estab-

¹ *Fogg v. Boston &c. R. Co.*, (1889) 148 Mass. 513; s. c. 12 Am. St. Rep. 583.

² *Bacon v. Michigan &c. R. Co.*, (1884) 55 Mich. 224.

³ *Philadelphia &c. R. Co. v. Quigley*, 21 How. 202. The contention of the railway company in this case was that being a corporation with defined and limited faculties and powers, and having only such incidental authority as is necessary to the full exercise of the faculties and powers granted by their charter, being a mere legal entity, it was incapable of malice, and that malice is a necessary ingredient in a libel; and that the action should be instituted against the natural persons who were concerned in the publication of the libel. But the court said: "To support this argument, we should be required to concede that a corporate body could only act within the limits and according to the faculties determined by the act of incorporation, and therefore that no crime or offense can be imputed to it. That, although illegal acts might be committed for the benefit or within the service of the corpora-

tion, and to accomplish objects for which it was created by their dominant body, that such acts, not being contemplated by their charter, must be referred to the rational and sensible agents who performed them, and the whole responsibility must be limited to those agents, and we should be forced, as a legitimate consequence, to conclude that no action *ex delicto* or indictment will lie against a corporation for any misfeasance. But this conclusion would be entirely inconsistent with the legislation and jurisprudence of the States of the union relative to these artificial persons. Legislation has encouraged their organization, as they concentrate and employ the intelligence, energy and capital of society for the development of enterprises of public utility. The powers of the corporation are placed in the hands of a governing body selected by the members, who manage its affairs, and who appoint the agents that exercise its faculties for the accomplishment of the object of its being. But these agents may infringe the rights of persons who are unconnected with the corporation,

lish liability, however, the publication must be shown to have been made by the company's authority, or to have been ratified by it, or to have been made by one of its servants or agents in the course of the business in which he was employed,¹ and if made in the course of his business the company is liable even though it was in excess of his authority and wrongful.² The law can not be invoked, however, to redress every breach of good morals or manners in newspaper publications.³

§ 452. **Libel by mercantile reporting agencies.**—A corporation acting as a commercial agency is liable for false and defamatory publications, when natural persons would be held liable. Their reports are privileged communications only when made to a subscriber interested in the pecuniary standing of the merchant reported.⁴ But the publication by a mercantile agency, organized for the purpose of ascertaining and reporting the financial standing and ability of merchants, traders, and other business men in reports issued and sent to the agency's subscribers, that a judgment had been recovered against plaintiff, is not libelous *per se*; and in an action therefor, when the complaint contains no allegation of special damage, there is no question for the jury.⁵ The circumstances under which a publication is made concerning a party and other matter published with it, may tend to characterize the words used so as to give to them an import productive of an imputation which otherwise they could not have.⁶ In cases of that character there may be a question for the jury to de-

or who are brought into relations of business or intercourse with it."

¹ *Fogg v. Boston &c. R. Co.*, (1889) 148 Mass. 513; s. c. 12 Am. St. Rep. 583.

² *Fogg v. Boston &c. R. Co.*, (1889) 148 Mass. 513; s. c. 12 Am. St. Rep. 583; *Home v. Newmarch*, 12 Allen, 49; *Hawes v. Knowles*, 114 Mass. 518; s. c. 19 Am. Rep. 383; *Levi v. Brooks*, 121 Mass. 501; *Goddard v. Grand Trunk Ry.*, 57 Me. 202; s. c. 2 Am. Rep. 39; *Philadelphia &c. R. Co. v. Doby*, 14 How. 468.

³ *Stewart v. Minnesota Tribune Co.*, (1889) 40 Minn. 101; s. c. 12 Am. St. Rep. 696, where it was held that a statement that a professional man had moved his office to his house to save expenses was not libelous.

⁴ *Bradstreet Co. v. Gill*, (1888) 72 Tex. 115; s. c. 13 Am. St. Rep. 768.

⁵ *Woodruff v. Bradstreet Co.*, (N. Y. 1889) 6 Ry. & Corp. L. J. 475.

⁶ This was illustrated in the cases of *Zier v. Hofflin*, 33 Minn. 66; *Shepherd v. Whitaker*, L. R. 10 C. P. 502; *Erber v. Dun*, 12 Fed. Rep. 526.

termine in view of the situation and relation so represented, and upon their finding may be dependent the question whether the words used are libelous. In these mercantile reports there is nothing except the import of the words themselves to characterize their purpose or effect, other than the fact that the business of the company is to furnish information of the pecuniary condition of persons whose vocations are such as to be likely to render business credit desirable. It is not seen that the character of the enterprise in which these companies are engaged gives to the mere statement of what purports to be a fact anything more than is expressed or fairly implied. The meaning of words in an action of slander or libel can not be extended by innuendo beyond their import, aided, as they may be, by extrinsic facts with which they are connected. The use of extrinsic evidence is to explain the application of words in connection with such facts as are alleged. Unless facts be alleged which will justify the inference that a publication of this character carries with it any meaning essentially different from that it would have if taken from any other source, the same rule will be applied. The fact that its apparent authenticity may have been greater, is not important.¹ Where an

¹ *Woodruff v. Bradstreet Co.*, (N. Y. 1889) 6 Ry. & Corp. L. J. 475, where the court *per* Bradley, J., continued: "The cases cited by the plaintiff's counsel have been examined, and none of them seem to support his contention. In *Williams v. Smith*, L. R. 22 Q. B. Div. 134, the publication in the *Hatters' Gazette*, London, for December, 1887, was to the effect that a judgment recovered against the plaintiff, who was a hatter, on the 13th day of October previous, remained unpaid. This appeared under headings, and in a column known as a "black list." The judgment was recovered as stated, and had been paid. It was held that the place where the words were located in the *Gazette*, and the inference which was permitted by their use—that the judgment remained unpaid—thus indicating the

plaintiff's default, justified the interpretation given by the jury, which rendered the publication libelous. That case is distinguishable from the present one by reasons which may support that recovery without aiding the plaintiff in this action. In *King v. Patterson*, 49 N. J. 417, the alleged libel was the publication of a statement to the effect, as construed, that the plaintiff, who was engaged in the clothing business, had put a chattel mortgage on her stock of goods. The case as reported indicates that special damages were alleged and proved, and so far as it there appears, the main ground of defense, upon the law, was that publication was privileged. That was the only question considered on review. By a divided court it was held not privileged. Upon that proposition the views of the court in *Sun-*

alleged libel consists in the publication by a mercantile reporting agency, for the information of its subscribers, of a sheet containing, among other business men's names, that of plaintiff, followed by asterisks, with no proof of any meaning attached thereto, except the testimony of defendant's superintendent, who testifies that they referred only to a marginal note directing persons, desirous of further information concerning the person in connection with whose name they occurred, to call at defendant's office, a verdict for the defendant should be directed, as the characters are not libelous *per se*, and are not shown to have any libelous significance as used.¹

derlin v. Bradstreet, 46 N. Y. 188, were adopted. The distinction in principle between the King Case and the present one, as well in the character of the report as in that of the damages alleged, is obvious. There the purport of the publication was that the plaintiff had mortgaged her stock of goods to secure an existing debt, and thus placed herself in a situation liable to result in embarrassment by means of the opportunity furnished by giving the mortgage to interrupt and break up her business. In such case an inference might be permitted that she would not place herself in that situation without an existing necessity for the protection of her business arising out of inability to pay. In that respect that case is distinguishable from *Newbold v. Bradstreet*, 57 Md. 38. The additional cases cited do not seem to require any special attention or comment here. These views lead to the conclusion that the judgment should be affirmed." All concurred, except Follett, C. J., and Vann, J., not sitting.

¹ *Kingsbury v. Bradstreet Co.*, (N. Y. 1889) 6 Ry. & Corp. L. J. 474. The publication in question, as read in evidence upon the trial, was headed "Improved Mercantile

Agency, The Bradstreet Company, Proprietors, Sheet of Changes and Corrections, Rochester, November 12, 1881. This information is furnished you in confidence, for your exclusive use and benefit, and subject to the conditions of your subscription to our agency." Then followed various lists of names of persons, with their residences and business appended, classified by States and towns, and opposite each name were certain figures or characters. Those under the head of "New York" were as follows:

Middleport,	James, Ed. Gro.	83	\$166 46
Mortons Corners,	Schroeder, H. N.,	G. S.	44
Lockport,	Lambert, Jno. Flour, &c.,	**	
Buffalo,	Beach, E. W. & I.,		
	Printers,	83	\$142
"	Taylor, Rich'd, Hotel,		60
Canandaigua,	Kingsbury, Sherman, Gro.	**	
"	Skidmore, Thomas, B. & S.	**	

At the bottom of the page upon which the foregoing appeared was the following: "***. For explanation, please call at our office." The opinion of the court *per Vann, J.*, was as follows: "The circular in question, on its face, is not a libel upon the plaintiff. It can not be presumed from the nature of the words used, and it has not been proved as a consequence directly re-

§ 453. Malicious prosecution — (a) In general.— The old doctrine was that a corporation was not liable to an action

sulting from their use, that the reputation of the plaintiff has been injured, either as a man or as a merchant. When construed according to their natural meaning they are innocent and harmless, and as thus construed, they were not shown to be false. The use of characters in the body of the page to direct the attention of the reader to the margin or bottom thereof is common in many publications, and of itself can excite neither suspicion nor surprise. The plaintiff proved that such was the sole intention of the defendant in making use of the double stars in the publication complained of. The only innuendo alleged by the plaintiff states simply what the defendant meant; not what its subscribers or the public understood. There is no apparent ambiguity as to the meaning or application of the words. Without proof of extrinsic facts, the language of the publication, including the character used, is capable of an innocent construction only. Standing by themselves, they are incapable of a defamatory meaning. If there was a latent injurious meaning arising from facts, known both to the defendant and its subscribers, which would reasonably lead the latter to understand the words in a secondary and a defamatory sense, it was neither alleged nor proved. Words not libelous *per se* may become so from the connection in which they are used, or the circumstances under which they are published. The situation and surroundings of the most innocent expression may make it libelous, but they must be distinctly alleged and proved. The mere position in a newspaper of an advertisement apparently inof-

fensive, but surrounded by suggestive items, may make it a question for the jury whether it is libelous or not. *Zier v. Hofflin*, 33 Minn. 66. Words are to be construed in the light of their surroundings; and although harmless upon their face, if found in bad company, may from that circumstance be determined to have an injurious meaning. It becomes a question for the jury, if there is any evidence of such extrinsic facts to be submitted to them. *Williams v. Smith*, L. R. 22 Q. B. Div. 134; *Odger on Sland. & Lib.* 113. The notification sheet in question contained many names, each with figures or characters printed opposite. If it had appeared that those figures and characters were parts of a cypher understood, or capable of being understood, by the subscribers, through a key furnished by the defendant, and that in each case, or even in many cases, they indicated that the person against whose name they stood had failed in business, or was preparing to fail, or was financially embarrassed, a case would have been presented for our determination quite different in its legal aspects from the one now under consideration. *Erber v. Dun*, 12 Fed. Rep. 526, 532; *Woodling v. Knickerbocker*, 31 Minn. 268; *Shepherd v. Whitaker*, L. R. 10 C. P. 514; *Bank v. Henty*, L. R. 5 C. P. Div. 514; *Ruel v. Tatnell*, 29 Week. Rep. 172. This appeal must be decided upon what was alleged and proved by the plaintiff, and not upon what might have been alleged and proved. On the record as presented, we think that it was the duty of the learned justice who presided at the circuit to direct a verdict for the defendant. We

for malicious prosecution, because malice is the gist of the action, and it was said that malice could not be imputed to a mere legal entity, which having no mind could have no motive and therefore no malice. But the steady process of judicial evolution tends toward the establishment of the just doctrine of the civil responsibility of a corporation for the acts of the sentient persons who represent it, and through whom it acts, and of the liability of a corporation for the acts of its agents under the conditions that attach to individuals.¹ By the rule of analogy, also, if actions for malicious libel, for vexatiously and maliciously obstructing another in business, for wilful trespasses, and for assault and battery, in each of which the motives and intent of the mind are directly involved, can be maintained against a corporation aggregate, no reasons, founded upon principle, can be suggested why an action for malicious prosecution also should not be sustainable against it. When the nature of the action is considered it comes strictly within the principles by which the actions above enumerated are maintainable. To hold a corporation amenable to this particular action is strictly in ac-

have examined the exceptions relating to evidence, but in the light of the suggestions already made, it is obvious that none of them were well taken. The judgment should be affirmed with costs." All concurred, except Bradley and Haight, JJ., not sitting.

¹ *Williams v. Planters' Ins. Co.*, (1880) 57 Miss. 759; s. c. 34 Am. Rep. 494; *New Orleans &c. R. Co. v. Bailey*, 40 Miss. 365; *Wheless v. Second Nat. Bank*, 1 Baxt. 469; s. c. 25 Am. Rep. 783; *Reed v. Home Savings Bank*, 130 Mass. 443; s. c. 39 Am. Rep. 468. "If a corporation be the intangible being it is asserted to be, a greater and more mischievous monster can not be imagined. According to the doctrine contended for, if they do act within the scope of their corporate powers, it is legal and they are not amenable for it. If the act be not

within the scope of their legitimate powers, they had no right to do it; it was not one of the objects for which they were incorporated, and therefore it is no act of the corporation at all. This doctrine leads to absolute immunity for every species of wrong, and can never be sanctioned by any court of justice." *Boogher v. Life Assoc.*, (1882) 75 Mo. 325, quoting approvingly *Binney's* observations in *Chestnut Hill &c. Co. v. Rutter*, 4 Serg. & R. 11, and overruling *Gillett v. Missouri &c. R. Co.*, 55 Mo. 315; s. c. 17 Am. Rep. 653, where it was held that a criminal prosecution for embezzlement was not within the scope of a corporation's general or special powers, and therefore the action would not lie. *Gillett v. Missouri &c. R. Co.*, 55 Mo. 315; s. c. 17 Am. Rep. 653, overruled by *Boogher v. Life Assoc.*, (1882) 75 Mo. 319.

cordance with well-settled legal principles. The action involves nothing more than a wrongful act intentionally done.¹ Accordingly it is almost universally held in recent cases that a corporation is liable to an action for a malicious prosecution conducted by its agents.²

¹ *Vance v. Erie Ry. Co.*, 32 N. J. 334; *Fenton v. Wilson & Co.*, 9 Phila. 189; *Copley v. Grover & Co.*, 2 Woods, 494.

² *Williams v. Planters' Ins. Co.*, 57 Miss. 759; *Carter v. Howe Machine Co.*, 51 Md. 290; *Wheless v. Second Nat. Bank*, 1 Baxt. 469; s. c. 25 Am. Rep. 783; *Goodspeed v. East Haddam Bank*, 22 Conn. 530; *Jordan v. Alabama Great Southern R. Co.*, 74 Ala. 85; s. c. 49 Am. Rep. 800, overruling *Owsley v. Montgomery & Co. R. Co.*, 37 Ala. 560; *Pennsylvania Co. v. Weddle*, 100 Ind. 138; *Morton v. Metropolitan Life Ins. Co.*, 34 Hun, 366. "The reasons were well stated by the learned court in the leading case upon the subject. These institutions have so multiplied and extended within a few years, that they are connected with and in a great degree influence all the business transactions of this country and give tone and character to some extent to society itself. We do not complain of this; but we say that as new relations from this cause are formed and new interests created, legal principles of a practical rather than a legal character must be applied. . . The views of the old lawyers, regarding the real nature of corporations, to a great extent are exploded in modern times, and it is believed that now these bodies are brought to the same civil liabilities as natural persons, so far as this can be done practically, and consistently with their respective charters. And no good reason is discovered why this should not be so; nor why it can not be done, in a case like this, without

violating any sensible or useful principle. . . . But after all, the objection to the remedy of this plaintiff against the bank in its corporate capacity, is not so much that as a corporation it can not be made responsible for torts committed by its directors, as that it can not be subjected to that species of tort which consists in motive and intention. The claim is, that as a corporation is ideal only, it can not act from malice and therefore can not commence or prosecute a malicious or vexatious suit. This syllogism or reasoning might have been very satisfactory to the schoolmen of former days; more so, we think, than to the jurist who seeks to discover a reasonable and appropriate remedy for every wrong. To say that a corporation can not have motives and act from motives is to deny the evidence of our senses, when we see them thus acting, and effecting thereby results of the greatest importance every day. And if they can have any motive, they can have a bad one; they can intend to do evil as well as to do good. If the act done is a corporate one, so must the motive and intention be. In the present case, to say that the vexatious suit, as it is called, was instituted, prosecuted and subsequently sanctioned by the bank, in the usual modes of its action; and still to claim that although the acts were those of the bank, the intention was only that of the individual directors, is a distinction too refined, we think, for practical application." *Goodspeed v. East Haddam Bank*, 22 Conn. 530.

§ 454. (b) Want of probable cause.—The want of probable cause and malice on the part of the agent in making an arrest, or causing an arrest to be made, if established, may be imputed to the corporation.¹ And in an action of malicious prosecution the burden of proving malice and the absence of reasonable or probable cause is on the plaintiff.²

§ 455. Illustrations.—The liability of a corporation for annoyance and discomfort caused is the same as that of individuals for a similar wrong. The doctrine that an action will not lie against a corporation for a tort is exploded. The same rule applies to corporations as to individuals. They are equally responsible for injuries done in the course of their business by their servants. This is said to be so well settled as not to require the citation of authorities.³ Where the local agent of a telegraph company, who was also agent of an express company at the same place, sent a forged dispatch to a merchant in a neighboring city, requesting him to forward money to his correspondent at the former place, to use in buying grain, and the dispatch was sent and the money forwarded by express in response to the telegram but was intercepted and converted to his own use by the agent, the telegraph company was liable though an action might also have been maintained against the express company.⁴ For as was said by the court, the defendant selected its agent, placed him in charge of its business at the station in question, and authorized him to send messages over its line. Persons receiving

¹ *Krulevitz v. Eastern R. Co.*, 140 Mass. 575.

² *Abrath v. Northeastern Ry. Co.*, (1888) 11 Q. B. Div. 440; s. c. 25 Am. L. Reg. 757. In the case of the prosecution of a physician for conspiring with a claimant of personal injuries against a railroad, in pretending that there were injuries suffered and manufacturing symptoms thereof, where the statements of several persons were obtained and carefully considered and laid before counsel, who advised prosecution therefor, and the magistrates afterward thought

the preponderance of evidence was such as that they ought to send the case on for trial, a finding of reasonable and proper cause and of absence of malice on the part of the company was warranted. *Abrath v. Northeastern Ry. Co.*, (Eng. Ct. of App. 1888) 11 Q. B. Div. 440; s. c. (Eng. H. of L.) 25 Am. L. Reg. 757.

³ *Baltimore &c. R. Co. v. Fifth Baptist Ch.*, (1888) 108 U. S. 317.

⁴ *McCord v. Western &c. Co.*, (1888) 39 Minn. 181; s. c. 4 Ry. & Corp. L. J. 452; *Telegraph Co. v. Dryburg*, 35 Pa. St. 298.

dispatches in the usual course of business, when there is nothing to excite suspicion are entitled to rely upon the presumption that the agents intrusted with the performance of the business of the company have faithfully and honestly discharged the duty owed by it to its patrons, and that they would not knowingly send a false or forged message, and it would ordinarily be an unreasonable and impracticable rule to require the receiver of a dispatch to investigate the question of the integrity and fidelity of the defendants' agents in the performance of their duties before acting. Whether the agent is unfaithful to his trust, or violates the duty to, or disobeys the instructions of, the company, its patrons may have no means of knowing. If the corporation fails in the performance of its duty through the neglect or fraud of the agent whom it has appointed to perform it, the master is responsible. It was the business of the agent to send dispatches of a similar character, and such acts were within the scope of his employment, and the plaintiff could not know the circumstances that made the particular act wrongful and unauthorized. As to him, therefore, it must be deemed the act of the corporation.¹ The Pullman Palace Car Company is liable for injuries sustained by occupants of its sleeping-cars through the negligence or wilful misconduct of an employee whom it places in charge of a car. So where the porter placed in charge of such a car by the company makes a criminal assault on a female occupant thereof, she is entitled to recover from the company a fair pecuniary compensation for all injuries, temporary or permanent, directly caused to her in her person, health and strength, including compensation for the pain and suffering, mental and physical, which has been, or may thereafter, be caused.² But the obligation of a sleeping-car company for injury to an ordinary passenger on the train who entered the car for the purpose of asking the privilege of washing his hands and is there wantonly and without prov-

¹ *McCord v. Western &c. Co.*, (1888) 39 Minn. 181; s. c. 4 Ry. & Corp. L. J. 453; *Bank v. Telegraph Co.*, 52 Cal. 280; *Booth v. Bank*, 50 N. Y. 400.

² *Campbell v. Pullman Palace Car Co.*, (1880) 42 Fed. Rep. 484; s. c. 8 Ry. & Corp. L. J. 195.

ocation assaulted and beaten by the porter of the car, is governed by the principles of the law of master and servant and the company is not liable for such unauthorized wilful wrong.¹ But at the suit of the same plaintiff against the railway company, to whose train the sleeping-car was attached, the company was held liable, as the passenger was not a trespasser on the sleeping-car.² In another case where a corporation has been held liable under this rule of *respondere superior* it appeared that a railroad company was in peaceable possession of a piece of road, and while so in possession another company by an armed force of several hundred, men acting as its agents and employees, under its vice-president and assistant general manager, attacked with deadly weapons the agents and employees of the company having charge of the road, forcibly taking possession thereof. There was a demonstration of armed men all along the line of the railroad seized, and while this was being done and the seizure was being made, the plaintiff, an employee of the company in possession, being on the track of the road, defending it with arms, was fired upon by the men of the attacking company and seriously injured. Immediately upon the seizure of the railroad the employer of the seizing forces accepted it and entered into possession, and for a time used and operated it as its own. The plaintiff brought suit to recover damages for his injuries, and it was held that the seizing company was liable in tort for the acts of its agents, that the plaintiff could recover not only damages for the injuries actually received, but punitive damages also.³

§ 456. Nuisance.— On an indictment for a nuisance it was said that if a corporation commits a trespass on private property or obstructs a way to the special injury and damage of an individual, no one could doubt its liability therefor.⁴ In like manner, and for the same reason, if they do similar acts to the inconvenience and annoyance of the public, they are responsible in the form and mode appropriate to the prosecu-

¹ Williams v. Pullman &c. Co., (1888) 40 La. Ann. 87.

³ Denver &c. Ry. Co. v. Harris, (1886) 122 U. S. 597.

² Williams v. Pullman Palace Car Co., (1888) 40 La. Ann. 417.

⁴ Commonwealth v. Proprietors, (1854) 2 Gray, 346.

tion and punishment of such offenses.¹ Legislative authority to a railroad company to bring its tracks within municipal limits and to construct shops and engine houses there does not confer authority to maintain a nuisance by the noises and smoke in and from its engines and workshops.² But the erection of telegraph poles in city streets can not be complained of by one not suffering special damage, when the erection is authorized by statute and ordinance.³ Neither are telegraph poles and wires in a public street necessarily a nuisance which will be prohibited at the suit of one in front of whose lot they are erected.⁴

§ 457. *Trespass quare clausum*.—Trespass *quare clausum* lies against a corporation entering upon land under color of the power of eminent domain for the purpose of constructing its works without having complied with all the statutory provisions respecting condemnation, or without having paid or deposited, or given security for the amount awarded, or, as in case of a railroad company, when it wastes lands lying beyond the limits of its right of way,⁵ or under color of a stat-

¹ Commonwealth v. Proprietors, (1854) 2 Gray, 346; State v. Morris &c. R. Co., 23 N. J. 360; Maund v. Monmouthshire Canal Co., 4 Man. & G. 452; Queen v. Birmingham &c. Ry. Co., 3 Ad. & El. N. S. 223; Queen v. Great North &c. Ry. Co., 9 Ad. & El. N. S. 315; Eastern Counties Ry. v. Broom, 6 Exch. 314.

² Baltimore &c. R. Co. v. Fifth Baptist Ch., (1882) 108 U. S. 317, holding that an action lies by the church in its corporate capacity against the railroad company for such a nuisance in running their cars and engines, ringing bells, blowing off steam, and making other noises in the vicinity of a church, or meeting house, on the Sabbath, and during public worship, as to annoy and molest the congregation worshipping there and greatly to depreciate the value of the house and render the same unfit for a place of religious

worship. Acc. First Baptist Ch. v. Schenectady &c. R. Co., (1848) 5 Barb. 79.

³ Gray v. Mutual Union Telegraph Co., 12 Mo. App. 485.

⁴ Hewett v. Western Union Telegraph Co., 4 Mackey, (D. C.) 424; s. c. 54 Am. Rep. 284.

⁵ Blodgett v. Utica &c. R. Co., 64 Barb. 480; Cohen v. St. Louis &c. R. Co., 34 Kan. 158; s. c. 55 Am. Rep. 242; Eaton v. Boston &c. R. Co., 51 N. H. 504; s. c. 12 Am. Rep. 147; Lee v. Pembroke Iron Co., 57 Me. 481; s. c. 2 Am. Rep. 59; Beach on Railways, §§ 830, 851, where this subject is fully treated. See also: Imboden v. Etowah &c. Mining Co., 70 Ga. 86; Hobbs v. Amandor &c. Canal Co., 66 Cal. 161. But where the evidence in a case failed to show that defendant, a water company, had not used proper care in repairing its dam, the breaking of which

ute which does not confer the authority,¹ or under a statute which makes no provision for compensation.² A malicious and oppressive trespass by a railway's agents upon the rights of a telegraph company in pulling up its poles, upon the alleged ground that they were upon the railroad's right of way, may entitle it to exemplary or punitive damages, when the result of the trespass is to impair its credit and subject it to the expense of litigation. The sense of wrong and insult, consequent on the trespass, which, as between natural persons, entitles one to redress by way of exemplary damages, has, however, no application in a suit by a corporation.³ But it has been held that in an award of two hundred dollars as actual and ten thousand dollars as exemplary damages, the disproportion was so great as to manifest that spirit of prejudice or partiality in a jury which required a reversal of the judgment.⁴ In an action against a corporation for malicious trespass, declarations of a servant indicating his own indifference to the consequences of the trespass are inadmissible; but declarations made by him prior to the completion of the trespass as to matters within the scope of his employment are admissible to show the *animus* of defendant.⁵

§ 458. Crimes and misdemeanors.—It has been said that a corporation can not be held criminally liable for any act of which intent or personal violence is an essential ingredient, such as larceny or assault and battery, a corporation being held incapable of either intention or violence.⁶ The ac-

injured plaintiff's mining claim, and washed away his tools, the judgment in plaintiff's favor for damages was reversed, and a new trial ordered. *Weidekind v. Tuolumne County Water Co.*, (1887) 74 Cal. 386.

¹ *Beach on Railways*, § 851, and cases there cited; *Whitehead v. Arkansas Central R. Co.*, 28 Ark. 460; *Secomb v. Milwaukee & C. R. Co.*, 49 How. Pr. 75; *Pennsylvania R. Co. v. Eby*, 107 Pa. St. 166.

² *Seneca R. Co. v. Auburn & C. R. Co.*, 5 Hill, 170; *Trenton Water Power Co. v. Raff*, 56 N. J. 335;

Williamson v. Canal Co., 78 N. C. 156; *Cogswell v. Essex Mill Co.*, 6 Pick. 94; *Beach on Railways*, § 851.

³ *International & C. R. Co. v. Telephone & C. Co.*, (1887) 69 Tex. 277; s. c. 5 Am. St. Rep. 45.

⁴ *International & C. R. Co. v. Telephone & C. Co.*, (1887) 69 Tex. 277; s. c. 5 Am. St. Rep. 45.

⁵ *International & C. R. Co. v. Telephone & C. Co.*, (1887) 69 Tex. 277; s. c. 5 Am. St. Rep. 45.

⁶ *Cumberland & C. Co. v. Portland*, (1868) 56 Me. 78; *Androscoggin & C. Co. v. Bethel & C. Co.*, 64 Me. 443. In both of these cases the opinion was

cused must be one against whom the accusation of the crime can be made. He must be one who could "be guilty of the offense described," and who can be punished for it, which a corporation can not be.¹ But this doctrine has been questioned in a modern case. As the courts have shown a tendency to extend the liability of corporations in civil actions for the misfeasance of their agents, and it seems now well settled that they may be held liable in suits for libel, for malicious prosecution, and for assaults and batteries committed by their agents in the performance of their duties, and in view of the further fact that they may in such suits be subjected to exemplary or punitive damages, the statement that they can not be held liable to any offenses which derive their criminality from evil intention may well be questioned. The very basis of an action of libel, or for a malicious prosecution, is the evil intent, the malice of the party against whom such a

by Appleton, C. J. The first was an action in debt to recover a penalty for injuring the canal of the plaintiff to which a penalty of from fifty to five thousand dollars had been attached by a section of the special act creating the canal. The city of Portland had filled up two hundred yards of the canal. And it was held that although a town could be indicted for the neglect of duties imposed by statute when the statute so provides, it could not be indicted for malicious tort, though committed by one of its officers in accordance with its express vote. Towns can not do an act wilfully and maliciously. The other case was in debt against a corporation for fraudulently and wilfully taking logs under a statute which attaches a penalty thereto. In the second case it was said that it is obvious that the defendant corporation could not be indicted for a wilful taking and conversion. The intent with which the act prohibited is done is individual, not corporate intent. Larceny can not, by any existing law, be predicated of any corporate action of a corporation, nor is there any provision for its punishment for the crime, if it were one which it is capable of committing. It is manifest, therefore, that a corporation is not, and was not intended to be, included within the word "whoever," but that the section applies only to personal criminality. Now "whoever is guilty of the offense described" is liable to this action of debt and to the payment of "double the value of the log, mast or spar so dealt with," not those who are not and who can not be guilty of the offense so described.

¹ *Androscoggin &c. Co. v. Bethel &c. Co.*, (1875) 64 Me. 443. So it has been held that a corporation is not liable for a penalty imposed by statute on the owner, agent or superintendent of a manufacturing corporation for employing children under ten years in laboring more than ten hours a day. *Benson v. Monson &c. Co.*, 9 Metc. 562.

suit is brought; and it has been said to be difficult to see how it is possible to hold that a corporation may be sued for a libel and punitive damages recovered, and at the same time hold that a corporation could not be indicted for such libel. The suits of libel and malicious prosecution are in their nature very like to criminal proceedings, and if they lie against a corporation, it would seem to follow that there are cases for which indictments may lie against a corporation where the evil intention constitutes an element in the offense. And if a corporation is, as has been said, liable civilly for an assault and battery committed through its servants, it is perhaps going too far to say that a corporation can in no case be liable criminally for any offenses against the person under any circumstances.¹

§ 459. The same subject continued.—There seems to be no reasonable objection to laws which make corporations criminally liable for the misconduct of their officers and agents in the discharge of their duties.² If the laws impose duties of a general or public character upon corporations, they must provide modes to compel their performance. The mode of prosecution by indictment does not seem to be open to any objection which would not equally apply to any kind of criminal prosecution. Corporations necessarily transact their business by means of agents. If they are held responsible criminally, it must generally, perhaps always, be for acts or neglects of those agents. If they are thus answerable for negligence and omissions of agents, it is argued that they may be made liable, in a proper case, for their acts.³ Since the capacity to act is given corporations by law, no good reason appears why they may not intend to act in a criminal manner, as mere intentional wrong acting is all that is necessary in a class of criminal cases.⁴ In Missouri the statute

¹ *Per* Green, J., in *State v. Baltimore &c. R. Co.*, 15 W. Va. 380, where the corporation was held guilty of Sabbath breaking.

² *Boston &c. R. Co. v. State*, (1855) 32 N. H. 227.

³ "Towns and counties are at common law responsible for the repair of highways and bridges and liable

to indictment for neglect of their duty in this respect. Turnpike corporations were usually by statute subjected to the same liability, so far as we have heard, without objection." *Boston &c. R. Co. v. State*, (1855) 32 N. H. 227.

⁴ 1 Bishop Crim. Law, § 418.

authorizes the criminal prosecution of a corporation for libel.¹ The criminal code of New York declaring that the grand jury has the power, and making it their duty, to inquire into all crimes, and to present them to the court, applies to crimes of corporations as well as of individuals, and is not affected by the sections regulating criminal proceedings against corporations.²

§ 460. Conspiracy.—An action may be maintained against a corporation to recover damages caused by conspiracy.³ If actions can be maintained against corporations for malicious prosecution, libel, assault and battery and other torts there is no reason for holding that actions may not be maintained against them for conspiracy.⁴ For it is well settled by the authorities that the malice and wilful intent needed to sustain such actions may be imputed to corporations.⁵

§ 461. Contempt.—A corporation may be punished for contempt of court.⁶ Thus where officers of a corporation are enjoined from infringing a patent right, yet subsequently engage in the manufacture of the infringing article, as managing officers of another corporation, not licensed to manufacture under the patent, they will be guilty of contempt.⁷ But a corporation can only be punished for contempt through its officers, or those acting in aid of it. Thus through the presence

¹Brennan v. Tracey, 2 Mo. App. 540.

²People v. Equitable Gas-Light Co., (1889) 5 N. Y. Supl. 19. Referring to the provisions of N. Y. Crim. Code Proc. §§ 252, 675, 682, but holding that under the laws of New York, a corporation can not by any means be compelled to appear and submit to the jurisdiction of a court wherein an indictment against the corporation has been filed.

³Buffalo &c. Co. v. Standard Oil Co., (1887) 106 N. Y. 669.

⁴Buffalo &c. Co. v. Standard Oil Co., (1887) 106 N. Y. 669.

⁵Buffalo &c. Co. v. Standard Oil

Co., (1887) 106 N. Y. 669; Morton v. Metropolitan Life Ins. Co., 103 N. Y. 645; affirming 34 Hun, 387; Reed v. Home Sav. Bank, 180 Mass. 443; Krulivitz v. Eastern R. Co., 140 Mass. 575; Western News Co. v. Wilmarch, 33 Kan. 510.

⁶People v. Albany &c. R. Co., 12 Abb. Pr. 171; s. c. 20 How. Pr. 358; Mayor v. Ferry Co., 64 N. Y. 624; United States v. Memphis &c. R. Co., 6 Fed. Rep. 237; Golden Gate &c. Co. v. Superior Court, (1884) 65 Cal. 187.

⁷Iowa Barb Steel Wire Co. v. Southern Barbed Wire Co., 30 Fed. Rep. 123.

of its agent a Connecticut corporation is subject to the jurisdiction of the Illinois courts for the purposes of proceedings for contempt. It is sufficient to compel defendant, as manager in Illinois, to answer to the contempt proceeding, without making his company *eo nomine* a party.¹

§ 462. Injuries resulting in death.—A civil suit to recover damages for injuries resulting in death could not be maintained at common law.² This defect has been remedied in England by Lord Campbell's Act, which provides a method whereby the family of the deceased may recover compensation;³ and similar acts have been passed by the legislatures of the American States.⁴ In Maine, New Hampshire and Massachusetts, indictment and fine is used as a method of recovering damages for causing death, the fine being for the benefit of the deceased's relatives.⁵

§ 463. Distinction between misfeasance and non-feasance. A distinction is drawn between the liability of a corporation for misfeasance and non-feasance, but the difficulty in distinguishing the character of these offenses strongly illustrates the absurdity of the doctrine that a corporation is indictable for a non-feasance but not for a misfeasance.⁶ The distinction between a wrongful act and a wrongful omission, misfeasance

¹ *Sercomb v. Catlin*, (1889) 128 Ill. 556.

² *Beach on Railways*, § 1010.

³ *Beach on Railways*, § 1010, citing *Blake v. Midland Ry. Co.*, 18 Q. B. 93; *Duckworth v. Johnson*, 4 Hurl. & N. 653; *Boulter v. Webster*, 11 L. T. N. S. 598; *Pym v. Great Northern Ry. Co.*, 4 Best & Sm. 396.

⁴ *Brown v. Buffalo &c. R. Co.*, 22 N. Y. 191; *Cooley on Torts*, *271; 2 *Thompson on Negligence*, § 90; *Beach on Railways*, § 1010.

⁵ *State v. Maine Central R. Co.*, 60 Me. 490; *State v. Grand Trunk Ry. Co.*, 61 Me. 114; *Boston &c. R. Co. v. State*, (1855) 32 N. H. 215; *Commonwealth v. Boston &c. R. Co.*,

(1882) 8 Am. & Eng. R. Cas. 297; *Commonwealth v. Boston &c. R. Co.*, 129 Mass. 500; *Commonwealth v. Boston &c. R. Co.*, 11 Cush. 512; *Commonwealth v. Metropolitan R. Co.*, 107 Mass. 236; *Commonwealth v. Fitchburg R. Co.*, 11 Allen, 189; *Commonwealth v. Vermont &c. R. Co.*, 108 Mass. 7; *Commonwealth v. Fitchburg R. Co.*, 120 Mass. 372; *Commonwealth v. Boston &c. R. Co.*, 126 Mass. 61; *Commonwealth v. East Boston &c. Co.*, 13 Allen, 589.

⁶ *Commonwealth v. Proprietors*, (1854) 7 Gray, 346; *Queen v. Great North &c. Ry.*, 9 Ad. & El. N. R. 325.

and non-feasance has been explicitly denied. No assumption can be more unfounded. Many occurrences may be easily conceived, full of annoyance and danger to the public and involving blame to some individual or some corporation, of which the most acute person could not clearly define the cause, or ascribe them with more correctness to mere negligence in providing safeguards or to an act improper by nothing but the want of safeguards. If a company be authorized to make a bridge with parapets, but makes it without them, does the offense consist in the construction of the unsecured bridge, or in the neglect to secure it? If the distinction were always easily discoverable, why should a corporation be liable for one species of offense and not for the other? The incongruity of allowing the exemption is one strong argument against it.¹

§ 464. Penalty for crimes.—Although a corporation can not be capitally punished or imprisoned, there is no reason why it may not be fined, or suffer the loss of its corporate existence, for the same act which would subject an individual to the gallows.² Accordingly, it is held that a corporation may be sentenced or adjudged to pay a fine and abate a nuisance.³ But while it can be fined it seems it can not be compelled to perform a specific duty.⁴ Neglect of a public duty, however, by a corporation may always be prosecuted and punished by indictment,⁵ except for such acts as involve criminal intent or personal violence.⁶ Thus a railway company is liable to in-

¹ *Regina v. Great Northern &c. R. Co.*, 9 Q. B. 324, where Lord Denman continued: "The law is often entangled in technical embarrassments, but there is none here. It is as easy to charge one person or a body corporate with erecting a bar across a public road as with the non-repair of it; and they may as well be compelled to pay a price for an act as for the omission."

² 1 Bishop Crim. Law, § 423.

³ *Delaware &c. Co. v. Commonwealth*, 60 Pa. St. 367, in which it

is said that the advantage of indicting a company in nuisance cases is that it may be compelled to abate the nuisance, while a director, officer or agent could only be fined.

⁴ *Pittsburgh &c. Ry. Co. v. Commonwealth*, 10 Am. & Eng. R. Cas. 327.

⁵ *Commonwealth v. Central &c. Co.*, 12 Cush. 245; *Boston &c. R. Co. v. State*, 32 N. H. 215.

⁶ *Queen v. Birmingham &c. Ry. Co.*, 2 Gale & D. 243.

dictment for the act of its officer or employee in issuing receipts for goods without stamping them, if the law requires them to be stamped.¹ But it appears that a higher degree of proof is required in indictment proceedings than in civil actions against companies.²

¹United States *v.* Baltimore &c. R. Co., (U. S. C. C. D. W. Va. 1868) 7 Am. L. Reg. N. S. 757.

²East Tennessee &c. R. Co. *v.* Humphreys, 12 Lea, 200; s. c. 15 Am. & Eng. R. Cas. 472.

CHAPTER XXIV.

CAPITAL STOCK.

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| <p>§ 465. Introductory.</p> <p>466. Distinction between capital and capital stock.</p> <p>467. Stock in unincorporated associations.</p> <p>468. Increase of capital stock.</p> <p>469. Statutory authority requisite to increase or reduction.</p> <p>470. The same subject continued.</p> <p>471. Constitutionality of enabling acts.</p> <p>472. Whether directors may act under the enabling statute.</p> <p>473. Stockholders' right to subscribe to new stock.</p> <p>474. The same subject continued.</p> <p>475. Liability of holders of the new shares.</p> <p>476. Liability upon new shares issued as a bonus.</p> <p>477. Increase by stock dividends.</p> <p>478. The power to issue stock dividends.</p> <p>479. Prohibitions of stock dividends.</p> <p>480. Reduction of capital stock —</p> <p style="padding-left: 20px;">(a) Authority necessary.</p> | <p>§ 481. (b) By purchase of shares.</p> <p>482. (c) By refunding.</p> <p>483. Loss of property not a reduction of capital stock.</p> <p>484. Liability of shareholders after reduction.</p> <p>485. Irregularly issued stock — How far valid.</p> <p>486. The same subject continued.</p> <p>487. False certificates.</p> <p>488. Forged certificates.</p> <p>489. Liability for fraudulent issue.</p> <p>490. Over-issued stock.</p> <p>491. Fraudulently over-issued stock invalid.</p> <p>492. Personal liability of corporate agents over-issuing stock.</p> <p>493. Measure of damages for over-issuing stock.</p> <p>494. Liability of holders of over-issued stock — (a) In general.</p> <p>495. (b) Estoppel.</p> <p>496. (c) Knowledge of the creditor.</p> |
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§ 465. Introductory.— There is much conflict and confusion in economic writings concerning the definition of capital. Adam Smith defines it as “that part of a man’s stock which he expects to afford him a revenue.” John Stuart Mill says that whatever things are destined to supply productive labor, with the shelter, protection, tools, and materials which the work requires, and to feed and otherwise maintain the laborer during the process, are capital.¹ In respect of corpo-

¹ “Interest,” by John S. Watters, where the writer has collected many (Oct. 1890) 5 Belford’s Mag. 777, of these definitions among which

rate capital the word is in general use as signifying the sums paid in by the subscribers, with the addition of all gains and profits realized, with such diminutions as have resulted from losses incurred in transacting business.¹ In this sense the capital of a corporation is the fund with which it transacts its business and embraces all its property, real and personal, constituting the assets of the corporation such as are subject to execution at law.² So much of the capital as is represented by the capital stock issued, must always be kept unimpaired during the existence of the corporation; but that portion of the capital which represents the surplus arising from the operation of the business of the corporation is subject to the discretion of the managers in regard to its disposition. Therefore profits remain a part of the fund constituting the capital until actually divided among the stockholders, and if this fund is afterward reduced by losses, only the surplus can be divided, after deducting the amount of the capital first invested.³ Until a division by the proper authorities, this surplus fund belongs to the corporation.⁴ The words capital stock describe the interest of the stockholders in the corporation.⁵ They have been used to denote the property or means

are Ricardo's: "Capital is that part of the wealth of a country which is employed in production, and consists of food, clothing, tools, raw materials, machinery, etc., necessary to give effect to labor." McCulloch's: "The capital of a country really comprises all those portions of the produce of industry existing in it that may be directly employed, either to support human existence or to facilitate production." And Professor Wayland's: "The word capital is used in two senses. In relation to product, it means any substance on which industry is to be exerted. In relation to industry, the material on which industry is about to confer value; that on which it has conferred value; the instruments which are used for the conferring of value, as well as the means of sustenance by which the being is supported while

he is engaged in performing the operation." Mr. Watters' own definition is that capital is "wealth in use."

¹ Comstock, J. in *People v. Commissioners*, 23 N. Y. 192, 219. But more properly, the amount of the shares subscribed and not the sum actually paid in, constitutes the capital of a corporation. *Hightower v. Thornton*, 8 Ga. 486; s. c. 52 Am. Dec. 412; *State Bank v. Milwaukee*, 18 Wis. 281.

² *New Haven v. City Bank*, 32 Conn. 106.

³ *Phelps v. Farmers' &c. Bank*, 26 Conn. 268; Morawetz on Corporations, § 348.

⁴ *Williams v. Western &c. Co.*, (1883) 93 N. Y. 189.

⁵ "Stock Dividends and their Restraint," by M. Dwight Collier, (1894) 7 Am. Bar Assoc. Rep. 263.

contributed by the stockholders as the fund or basis for the business or enterprise for which the corporation or association was formed.¹ But capital stock, in its strict significance, exists only nominally; the money or property which it represents is the tangible reality. The one is the representative of the other.²

§ 466. Distinction between capital and capital stock.—

There is a distinction between the capital of a corporation and its capital stock, though they are often used as interchangeable terms.³ The capital stock is clearly not the same as property possessed by the corporation; for the capital stock remains fixed although the actual property of the corporation varies in value and is constantly increasing or diminishing in amount. What the amount of the capital shall be is within the discretion of the managers, but the amount of the capital stock is limited and determined by the charter and the laws governing it.⁴ It follows, therefore, that a limit imposed upon the capital stock of a corporation does not restrict the amount of property which it may own.⁵ Upon the distinction between the capital of a corporation which is its property, and the capital stock, which represents the interests of stockholders in the corporation, and is their property, the power of the States to

¹ *Bailey v. Clark*, 21 Wall. 284. So also it has been said to be the property of the corporation contributed by its stockholders, or otherwise obtained by it, to the extent required by its charter: *Williams v. Western Union Tel. Co.*, (1883) 93 N. Y. 162, 188. Again capital stock is "that money or property which is put in a single corporate fund by those who by subscription therefor become members of a corporate body." *Burrall v. Bushwick R. Co.*, 75 N. Y. 211. It has been held that the stock of a railroad company is the aggregate of the property and effects of the company; and that in its general form it is sum of money contributed in fixed proportions to the adventure. *St. Louis &c. Ry. v. Loftin*, (1875) 30

Ark. 708, quoting Mr. Justice Ingles in *State v. Wood*, 15 Rich. 185. In the assessment of taxes and for many other purposes, the capital does not include land grants to a railway corporation from the State or federal government. *Hightower v. Thornton*, 8 Ga. 486; s. c. 52 Am. Dec. 412; *St. Louis, &c. R. Co. v. Loftin*, 30 Ark. 693.

² *Hannibal &c. R. Co. v. Shacklett*, (1860) 30 Mo. 558.

³ "Stock Dividends and their Restraint," by M. Dwight Collier. (1884) 7 Am. Bar. Assoc. Rep. 257, 263.

⁴ *Farrington v. Tennessee*, 95 U. S. 686.

⁵ *Barry v. Merchants' Exchange Co.*, 1 Sandf. (N. Y.) 280.

subject the shares of national banking associations to taxation is based.¹

§ 467. Stock in unincorporated associations.— Stock in an unincorporated association may cover chattels, money, or land. The owners of the stock own the land, but without power to compel a partition or divert it from the use for which it was bought, unless a majority concur. Land so held may be converted into personality, as between the owners, if the change is convenient and will promote any beneficial object. Such a conversion does not affect the nature of the property, but merely varies the relations of the parties *inter se*.²

¹ *Weatherby v. Baker*, 35 N. J. Eq. 505; *Van Allen v. Assessors*, 3 Wall. 573, 584; *People v. Commissioners*, 4 Wall. 244.

² *Crawford v. Gross*, (Pa. Ct. Com. Pleas, 1889) 7 Ry. & Corp. L. J. 123. Here it appeared that an unincorporated association known as the Beef Butchers' Hide Association, composed of butchers and having no capital, appointed a committee to purchase a piece of real estate, known as the hide house, "for the butchers who subscribed to the stock." Subscriptions were obtained from some of the members, and certificates were issued to them for "shares in the stock of the Beef Butchers' Hide Association." With the money so obtained the property was bought, and a deed was made to three persons in trust for the "Beef Butchers' Association," and "for such persons as shall from time to time compose the same, for the uses and purposes and subject to the control of the association," and "on the incorporation of the said association to grant and convey" the same to it. The property had been, and continued to be, used by the whole association, but after the purchase the holders of the certificates received the rents from the association in the

form of interest on their certificates. Several years afterwards the association took up the original certificates, and issued to the holders new ones for "shares in the real estate of the hide-house property" of the association. The court explained that "The transactions which I have outlined were such as might have been expected from the circumstances and the relative position of the parties. The association originally formed was so loose as hardly to deserve the name. Every man following the trade of a butcher might become a member on depositing a few pounds of hides or fat, and withdraw at the end of the year or sooner as freely as he came. There was no capital and nothing to which the members could lay claim, except the proceeds of the stuff which they had brought to be cured or melted. The purchase of the hide-house worked no change, except that the subscribers took the place of the landlord while remaining, like the other members, tenants. So long as they had hides or fat to be prepared for market, and the rent was paid out of the proceeds, it was their interest not to eject the depositors or take any step that would hinder the prosecution of the business which was carried on for the

§ 468. Increase of capital stock.—A corporation can not legally increase its capital stock beyond the maximum amount fixed in its charter or original articles of association.¹ It is well settled that a corporation has no implied authority, either by resolution of the shareholders or by-law, to alter the amount of its capital stock where the charter has definitely fixed it at a certain sum. The shares of a corporation can neither be increased nor diminished in number or in their nominal value, unless this be expressly authorized by the com-

mon good. Such was the relation of the parties for more than thirty years, and the long continued occupancy of the buildings tended to beget the idea that the depositors were the owners, whether they had or had not paid any part of the purchase-money; and when the subscribers finally asserted their right, it was treated as doubtful or unfounded, and the case brought into court."

¹ *Scoville v. Thayer*, (1881) 105 U. S. 143; *Knowlton v. Congress &c. Co.*, 14 Blatchf. 364; *Grangers' Life &c. Ins. Co. v. Kamper*, 73 Ala. 325; *Moses v. Oscoee Bank*, 1 Lea, 398; *Ferris v. Ludlow*, 7 Ind. 517; *In re Ebbw. Vale &c. Co.*, 4 Ch. Div. 827; *Droitwich &c. Co. v. Curzan*, L. R. 3 Ex. Ch. 35, 42; *Stace & Worth's Case*, L. R. 4 Ch. 682; *Salem Mill Dam Co. v. Ropes*, 6 Pick. 23; s. c. 19 Am. Dec. 363; *New York &c. R. Co. v. Schuyler*, (1866) 34 N. Y. 30; *Sutherland v. Olcott*, (1884) 95 N. Y. 93, 100; *Mechanics' Bank v. New York &c. R. Co.*, 13 N. Y. 599; *Lathrop v. Kneeland*, 46 Barb. 432. *Cf.* *Chetlain v. Republic Life Ins. Co.*, 86 Ill. 220; *In re Kirkstall Brewery Co.*, 5 Ch. Div. 535. When a corporation is to increase its capital stock, this may be done as well by increasing the par value of those already outstanding, as by the issue of new shares. *Currier v. Lebanon Slate Co.*, 56

N. H. 262. *Cf.* *Howell v. Chicago &c. R. Co.*, 51 Barb. 378. If an increase is to be made by the issue of new shares, the manner of effecting the increase not being prescribed in the enabling act, it is immaterial whether it be made by awarding the stock to the stockholders as dividends in lieu of money, retaining the money for the purposes of the company, or by paying the stockholder the dividends in cash from the earnings of the enterprise, and selling the stock in the market to raise money for the corporate purposes. *Howell v. Chicago &c. Ry. Co.*, 51 Barb. 378. Increasing the capital stock of a corporation, and issuing new shares to be sold at less than par to supply a fund actually needed by the corporation, has been held not to be a fictitious increase of the stock within the meaning of a constitutional provision making fictitious increases void. *Stein v. Howard*, 65 Cal. 616; Cal. Const. art. xii., § 11. But when the charter of a company does not fix its capital stock more definitely than to declare its maximum and minimum amount, a corporation having begun business with less than the maximum capital, may, without legislative grant, increase it to the higher limit. *Gray v. Portland Bank*, 3 Mass. 364; s. c. 3 Am. Dec. 156; *Somerset &c. R. Co. v. Cushing*, 45 Me. 524.

pany's charter or by an act of the legislature.¹ Every attempt of the corporation to exert such power by any direct or express act of its officers before it is conferred by the legislature, is void.² It is said that whether the corporate stock has been properly increased or not, is a question the State only can raise.³ Although, on the other hand, it is held that an illegal increase or diminution of the capital stock of a company may be restrained by injunction.⁴ But of course a company having a portion of its originally authorized capital stock undisposed of, may permit one who is not a stockholder to subscribe for it.⁵ And old shares purchased by the corporation may be disposed of by the directors to whomsoever they will.⁶

§ 469. Statutory authority requisite to increase or reduction.—The subject of increasing or reducing the capital

¹ *Spring Co. v. Knowlton*, (1880) 103 U. S. 49; *Knowlton v. Congress &c. Co.*, 14 Blatch. 364; *New York &c. R. Co. v. Schuyler*, (1866) 34 N. Y. 30; *Railway Co. v. Allerton*, 18 Wall. 233; *Oldtown R. Co. v. Veazie*, 39 Me. 511; *Seignouret v. Home Ins. Co.*, (1885) 24 Fed. Rep. 332; 25 Am. L. Reg. 29; *Percy v. Millaudon*, 3 La. 569; *Grangers' Life Ins. Co. v. Kamper*, 73 Ala. 325; *Morawetz on Corporations*, § 230; *Taylor on Corporations*, § 133; *Green's Brice's Ultra Vires*, 158; *In re Financial Co.*, L. R. 2 Ch. 714; *Sewell's Case*, L. R. 3 Ch. 131; *Smith v. Goldsworthy*, 4 Q. B. 430. But see *Ambergate &c. Ry. Co. v. Mitchell*, 4 Ex. 540; s. c. 6 Eng. Ry. Cas. 234.

² *Railway v. Allerton*, (1873) 18 Wall. 233; *Wood v. Dummer*, 3 Mason, 308; *New York &c. R. Co. v. Schuyler*, (1866) 34 N. Y. 30; *Curry v. Scott*, 54 Pa. St. 270; *Smith v. American Co.*, 1 Nev. 428; *Smith v. Goldsworthy*, L. R. 4 Q. B. 430. The officers, directors and stockholders of a corporation can not, even by an unanimous agreement, made under an honest misapprehension of their powers, effect a valid increase of the

capital stock. *People v. Parker Vein Coal Co.*, 10 How. Pr. 543. The amount of shares is properly a part of the constitution of the company and does not strictly depend upon any clause, resolution or provision of the deed. The alteration of shares seems, therefore, not to come within provisions for the alteration of the deed. *Smith v. Goldsworthy*, 4 Q. B. 430.

³ *Pullman v. Upton*, 96 U. S. 328; *Upton v. Tribilcock*, 91 U. S. 45; *Upton v. Hansbrough*, 3 Biss. 421; *Upton v. Jackson*, 1 Flippin, 413.

⁴ *O'Brien v. Chicago &c. R. Co.*, 53 Barb. 568.

⁵ *Curry v. Scott*, 54 Pa. St. 270, 275.

⁶ *Hartridge v. Rockwell*, Charl. R. M. 260; *Page v. Smith*, 48 Vt. 266. If the corporation uses its surplus to buy up some of its own stock, the stockholders have no right to claim this *pro rata*, until it is ordered to be divided among them. *Wood's Ry. Law*, § 72, citing *Coleman v. Columbia Oil Co.*, 51 Pa. St. 74; *Wiltbank's Appeal*, 64 Pa. St. 256; *St. John v. Erie R. Co.*, 10 Blatch. 271; *Bradley v. Holdsworth*, 3 Mees. & W. 422.

stock of corporations is regulated in England by statute,¹ and in the American States both by statute and by constitutional provisions.² The New York "Stock Corporation Law" of 1890, provides that the stockholders' vote upon the question shall be taken at a meeting especially called for that purpose after notice to the members as prescribed therein.³ It is held that the provision of a similar act which requires a weekly newspaper notice, is for the benefit of the public at large, that the certified copy of the statement of proceedings filed with the Secretary of State must show the publication of this notice, and that if it does not, the Secretary's certificate of compliance with the law can not issue.⁴

¹The Companies Clauses Act of 1863, 26 & 27 Vic. ch. 118, §§ 12, 13, 16-21; the Railway Companies Act of 1867, 30 & 31 Vic. ch. 127, § 6; and the Railway Construction Facilities Act of 1864, 27 & 28 Vic. ch. 127, § 56.

²Stimson's Am. Stat. Law, (Jan. 1, 1886) § 453, citing the constitutions of Colorado, Alabama, Louisiana, Pennsylvania, Missouri, Arkansas, California, Illinois and Nebraska; Revision of N. J., (1877) p. 181, § 24; p. 1290, § 29; Pa. Bright. Purd. Dig. p. 343, §§ 33, 34; p. 348, § 55; Mo. Rev. Stat. 939; Mass. Pub. Stat. ch. 106, § 34; ch. 112, § 60; Ohio Rev. Stat., (1866) §§ 3262-3264; Ill. Ann. Stat., (1835) ch. 32, § 50; ch. 114, § 15; La. Rev. Stat. § 693.

³N. Y. Laws of 1890, ch. 564, which directs: § 45. Notice of the meeting, stating the time, place and object, and the amount of the increase or reduction proposed, signed by a majority of the directors, shall be published once a week, for at least three successive weeks, in a newspaper in the county where the company's principal business office is located, if any is published therein, and a copy of such notice shall be personally served upon or duly mailed to each stockholder or member at his post office address at least three weeks before the meeting.

§ 46. If at a meeting called for the purpose, a sufficient number of votes shall be in favor of an increase or reduction of the stock of the company, a certificate of the proceedings showing a compliance with the law, the amount of capital actually paid in, the whole amount of the debts and liabilities of the corporation, and the amount of the increased or reduced capital stock, shall be made, signed, verified and acknowledged by the chairman and secretary of the meeting, and filed in the office of the clerk of the county where its principal place of business shall be located, and a duplicate thereof in the office of the Secretary of State. When the certificate provided for has been filed, the capital stock of the corporation concerned shall be increased or reduced as the case may be, to the amount specified in such certificate. In case of the increase or reduction of the capital stock of a railroad corporation the certificate thereof shall have indorsed thereon the approval of the board of railroad commissioners. The proceedings of the meeting at which an increase or reduction is voted shall be entered upon the minutes of the corporation.

⁴State v. McGrath, 86 Mo. 239; Mo. Rev. Stat. § 939.

§ 470. **The same subject continued.**— While, however, legislative authority is usually requisite to a valid increase, the power may be inferred from charter authority to issue convertible bonds.¹ A telegraph company having statutory power to increase its stock and to purchase the property and franchises of other companies, may pay for the purchases with a part of an issue of new stock, if the property purchased is worth the price.² A statutory provision that no increase of the capital stock of a national bank shall be valid until the whole amount of the increase is paid in, and notice thereof has been transmitted to the comptroller of the currency, and his certificate obtained specifying the amount, is not violated where the proposed increase is reduced to the amount actually paid in, the latter being the amount of increase specified in the notice.³ For the vote of the shareholders is not *per se* an increase of the capital stock. Until the new stock is subscribed for at least, there is an element of uncertainty respecting the increase; and the shareholders may at any time before the new stock is taken, reconsider their vote.⁴ Under the New York "Stock Corporation Law" of 1890 an increase of the capital stock renders the stockholders subject to the same liabilities with respect to the additional capital as are provided by law in relation to the original capital.⁵

§ 471. **Constitutionality of enabling acts.**— The power of the legislature to authorize an increase or reduction of the capital stock depends upon the principles heretofore set forth in treating of charters and amendments,⁶ to wit, that the charter embodies a contract, the obligation of which the State may not impair;⁷ that any alteration thereof must either be unanimously accepted by the shareholders,⁸ or must be en-

¹ Belmont v. Erie Ry. Co., 52 Barb. 637, 699; Ramsey v. Erie Ry. Co., 38 How. Pr. 193, 216. Cf. Heath v. Erie Ry. Co., 8 Blatchf. 337; Jenks v. Central R. Co., cit. 52 Barb. 637, 675; Van Allen v. Illinois Central R. Co., 7 Bosw. 515; People v. Erie Ry. Co., 36 How. Pr. 129.

² Williams v. Western Union Tel. Co., 93 N. Y. 162.

³ Aspinwall v. Butler, (1890) 133

U. S. 595, construing U. S. Rev. Stat. § 5142.

⁴ Terry v. Eagle Lock Co., 47 Conn. 141.

⁵ N. Y. Laws of 1890, ch. 564, § 44.

⁶ *Supra*, Chapters II and III.

⁷ *Vide supra*, §§ 17 and 18.

⁸ *Vide supra*, § 41; Pacific R. Co. v. Hughes, (1885) 23 Mo. 294; Illinois River R. Co. v. Zimmer, (1858) 20 Ill.

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acted under a constitutional reservation to the State of the power to amend;¹ that even under this reserved power an amendment must not defeat or substantially impair the object of the corporate charter or any rights of property vested under it, either by impairing the rights of shareholders as between themselves,² by working injustice to the corporate creditors and diminishing the security upon which they have relied;³ and that, accordingly, when the contract of the shareholder is materially altered he may either restrain the acceptance of the amendment by the corporation⁴ or may consider himself released from his contract of subscription to its stock.⁵ As in regard to other amendments, the distinction between material and immaterial alterations, is here important as determining whether the acceptance of a majority is sufficient,⁶

¹*Vide supra*, § 36; *Pacific R. Co. v. Hughes*, (1855) 22 Mo. 294; *Illinois River R. Co. v. Zimmer*, (1858) 20 Ill. 654; *Buffalo &c. R. Co. v. Dudley*, (1856) 14 N. Y. 336; *Joslyn v. Pacific &c. Co.*, 12 Abb. Pr. N. S. 329; *Peoria &c. R. Co. v. Elting*, 17 Ill. 429; *Ottawa &c. R. Co. v. Black*, 79 Ill. 262; *Hay v. Ottawa &c. R. Co.*, 61 Ill. 422; *Newhall v. Galena &c. R. Co.*, 14 Ill. 273; *Danbury &c. R. Co. v. Wilson*, 22 Conn. 435; *Noyes v. Spaulding*, (1855) 27 Vt. 420; *Bish v. Johnson*, 21 Ind. 299; *Burlington &c. R. Co. v. White*, 5 Iowa, 409.

²*Vide supra*, §§ 23, 40.

³*Vide supra*, §§ 24, 40; *In re State Ins. Co.*, (1882) 14 Fed. Rep. 28; s. c. 11 Biss. 301; *Cooper v. Frederick*, 9 Ala. 742; *Palfrey v. Paulding*, 7 La. Ann. 363; *In re Credit Foncier*, L. R. 11 Eq. 356; *In re Telegraph Construction Co.*, L. R. 10 Eq. 384.

⁴*Vide supra*, § 43.

⁵*Vide supra*, § 43; *Oldtown &c. R. Co. v. Veazie*, 39 Me. 571; *Hughes v. Antietam &c. Co.*, (1871) 34 Md. 316. But when the power to amend the corporate charter has been reserved by the State, dissenting shareholders are not ordinarily re-

leased from their duties and liabilities by an amendment authorizing an increase or diminution of the capital stock. *East Lincoln v. Davenport*, (1876) 94 U. S. 801; *Nugent v. Supervisors*, 19 Wall. 241; *Mowrey v. Indianapolis &c. R. Co.*, 4 Biss. 78; *Pacific R. Co. v. Hughes*, (1855) 22 Mo. 291; s. c. 44 Am. Dec. 265; *Buffalo &c. R. Co. v. Dudley*, 14 N. Y. 336; *Schenectady &c. Co. v. Thatcher*, 11 N. Y. 102; *Troy &c. R. Co. v. Kerr*, 17 Barb. 581; *Moore v. Hudson River R. Co.*, 12 Barb. 156; *Whitehall &c. R. Co. v. Myers*, 16 Abb. Pr. N. S. 34; *East Tennessee &c. R. Co. v. Gammon*, 5 Sneed, (Tenn.) 507.

⁶*Vide supra*, § 42, cases cited on p. 77, notes 8, 9, 10 and 11. An amendment to the charter of a company taking from the shareholders and vesting in the directors the power to authorize an increase of the capital stock, is not such a fundamental change in the constitution of the corporation as will release dissenting shareholders from obligation upon their stock. *Payson v. Withers*, 5 Biss. 269; *Payson v. Stoeve*, 2 Dill. 428.

or whether the consent of all the members is requisite to give validity and effect to the proposed increase or reduction.¹

§ 472. Whether directors may act under the enabling statute.—The enabling statutes usually provide that every increase or reduction of capital stock must be authorized by a vote of the stockholders owning at least a majority of the stock of the corporation.² Although the charter provide that “all the corporate powers of said corporation shall be vested in and exercised by a board of directors,” this is considered to refer to the ordinary business transactions of the corporation, and does not extend to a reconstruction of the body itself, or to an enlargement of its capital stock.³ Accordingly in the absence of an express declaration to the contrary, power to increase or reduce the capital stock granted by statute to the company, is to be exercised by the body of members at large.⁴ It has been said, however, that where no mode of exercising a power given in a charter to increase the capital stock of a company is therein provided, or is to be found in any general act, and the charter does not require the assent of stockholders to the increase, nor provide for any public record of the action of the company, the only thing required is that a majority of the directors determine upon the increase; and their determination, shown by the records of the company declaring an increase, fulfills all the requirements.⁵ And in any case

¹*Vide supra*, § 42.

²N. Y. Laws of 1890, ch. 564, § 45, requiring a two-thirds vote of the stock. By the Companies Clauses Act of 1863, it is provided that a vote of three-fifths of the shareholders shall be necessary, unless the enabling act provides for a different majority. 26 & 27 Vic. ch. 118, §§ 12, 13. So, too, the consent of the holders of a majority of the shares is required by the constitutions of some States. Stimson's Am. Stat. Law, (Jan. 1, 1886) § 453, citing the constitutions of Pennsylvania, Missouri, Arkansas, California, Colorado, Alabama and Louisiana.

³*Railway Co. v. Allerton*, (1873) 18 Wall. 233.

⁴*Percy v. Millaudon*, 3 La. 568; S. C. 17 Am. Dec. 196; *Railway Co. v. Allerton*, (1873) 18 Wall. 233; *People v. Vein Coal Co.*, 10 How. Pr. 543; *Crandall v. Lincoln*, 52 Conn. 73, 99; *Eidman v. Bowman*, 58 Ill. 444; *Finley Shoe &c. Co. v. Kurtz*, 34 Mich. 89.

⁵*Sutherland v. Olcott*, (1884) 95 N. Y. 93, holding also that when the charter of the company practically directs that the power to increase the capital stock shall be exercised by the directors, their decision as to the necessity for an increase, if un-

the shareholders may be estopped by acquiescence from contesting the legality of an increase or reduction made by the directors under statutory authority to the corporation.¹

§ 473. Stockholder's right to subscribe to new stock.—

A stockholder of the old stock, at the time of the vote to augment the capital of a company, has a right in the new stock, in proportion to the amount of his interest in the old, of which he can not be rightfully deprived by the other stockholders.² This right is now usually given by statute, so that

biased by fraudulent motives, is conclusive.

¹ *Railway Co. v. Allerton*, (1873) 18 Wall. 233; *Eidman v. Bowman*, 58 Ill. 444; *Payson v. Stoeve*, 2 Dill. 424; *Sewell's Case*, L. R. 3 Ch. 131; *Lane's Case*, 1 De Gex, J. & S. 504.

² *Gray v. Portland Bank*, (1807) 3 Mass. 363; S. C. 3 Am. Dec. 156, where Sedgwick, J., said: "At the time of the vote to augment the capital of the bank, all the stockholders were partners. The augmentation was supposed to be, and intended for the benefit of the joint concern; the capacity to augment was in virtue of their joint interest; and it could only be done by the will of the majority, and that in pursuance of their original association. The law by which the partnership existed and by which the united interest was regulated, was that alone by which the augmentation could be made. Whenever a partnership adopts a project, within the principles of their agreement, for the purpose of profit, it must be for the benefit of all the partners in proportion to their respective interests in the concern. Natural justice requires that the majority should not have authority to exclude the minority. What is there in this case which should make it an exception from that general principle? There is nothing, that I can perceive, in

the nature of the thing. Suppose it to have been morally certain that the augmentation would have been double in value, to the amount of the money necessary to make it; could a combination of a majority have deprived the minority of their proportion? The whole number of shares was one thousand; could the proprietors of five hundred and one have engrossed the whole, and deprived their partners of their shares? It is impossible. At the time of the vote to augment the capital, a banking house had been purchased, and become the property of the institution. In this the plaintiff was personally interested, in proportion as his interest in the bank was to the amount of the whole stock. After the capital is increased, the banking house is, as it was before, the joint property of the stockholders; and the consequence of excluding him from the new stock without any compensation, is depriving him without any consideration of two-thirds parts of his property in this house. This shows, in a very glaring light, how unfounded is the principle for which the defendants contend." *Sewall, J.*, also referring to the partnership increase in the stock, said: "Considering an incorporation for a bank, as I think it may be more correctly stated, to be a trust created with certain

when a company determines to increase its capital stock, each holder of the original stock has a right to subscribe for and purchase a proportionate amount of the new stock at par.¹ Under an act which permits insurance corporations to increase their capital stock by increasing the number of shares, to be allotted *pro rata* to the stockholders according to their interest, stockholders can not be charged a bonus, and a court of equity will enjoin the company from refusing to allow a stockholder to receive his allotment at par without paying the bonus.² And generally, a stockholder may enjoin the corporation from any attempt to deprive him of this right.³ Or he may sue the company by a special count in *assumpsit* and recover for the loss.⁴ But a clause in a charter, conferring upon

limitations and authorities, in which the corporation is trustee for the management of the property, and each stockholder a *cestui que trust* according to his interest and shares, then a limitation of the capital employed in the trust, that it shall not be less than one sum, and not exceeding a certain greater sum, is not a power granted to the trustee to create another interest for the benefit of other persons than those concerned in the original trust, or for their benefit in any other proportions than those determined by their subsisting shares. It is clear that a power of that kind might be given, but not by the limitation supposed, which plainly relates to one and the same stock. Whether the least or the greatest, or any intermediate sum be employed in it, the trust is the same, and for the use and benefit of the same persons. A share in the stock or trust, when only the least sum has been paid in, is a share in the power of increasing it, when the trustee determines, or rather when the *cestui que trusts* agree upon employing a greater sum, within the limits provided in the purposes of the trust." *Reese v. Bank of Montgomery*, 31 Pa. St. 78;

s. c. 72 Am. Dec. 726; *In re Wheeler*, 2 Abb. Pr. N. S. 364; *Pratt v. American Bell Telephone Co.*, 141 Mass. 225; s. c. 55 Am. Rep. 65; *Bank of Montgomery v. Reese*, 26 Pa. St. 143; *Eidman v. Bowman*, (1871) 58 Ill. 444; *Jones v. Morrison*, 31 Minn. 140; 26 & 27 Vic. ch. 118, § 17. *Contra*, *Ohio Ins. Co. v. Nunnemacher*, 15 Ind. 294.

¹ *Cunningham's Appeal*, 108 Pa. St. 546. If the original ordinary stock or shares are at a premium, at the time of the issue of the new, the latter is to be offered at par to the holders of the former in proportion, as nearly as conveniently may be, to the number of original shares held by them respectively. 26 & 27 Vic. ch. 118, § 17.

² *Cunningham's Appeal*, 108 Pa. St. 546, *Paxson, J.*, dissenting as to the remedy in equity.

³ *Dousman v. Wisconsin & Co.*, (1876) 40 Wis. 418, where it was held that the injunction should be upon the corporation itself and not upon its directors personally, for they may be changed from time to time and thus the decree be rendered ineffective.

⁴ *Gray v. Portland Bank*, 3 Masc. 364; s. c. 3 Am. Dec. 156; *Eid-*

the directors the power to increase the stock "on such terms and conditions, and in such manner as to them shall seem best," is held to exclude the shareholders' right to demand that they be allowed to subscribe for the new.¹ The proportion of new stock must be approximated as nearly as it may be fixed in integral shares.²

§ 474. **The same subject continued.**— Shareholders, of course, have no right to demand a gratuitous distribution of the new stock in proportion to the amount of original stock held by them.³ Nor can a majority of the stockholders of a corporation, without the consent of the minority, dispose of new stock without regard to its actual value.⁴ The stockholder must avail himself of the right within the time prescribed, or if none be fixed, within a reasonable time.⁵ A stockholder who has not taken his proportion of new shares of stock in a corporation is deprived of any right to a premium obtained on a sale thereof, pursuant to a vote of the stock-

man v. Bowman, 58 Ill. 444; Sewall v. Eastern R. Co., 9 Cush. 5. In actions for damages the plaintiff must prove demand and tender of payment within a reasonable, or the specified time. Wilson v. Bank of Montgomery, 29 Pa. St. 537. The measure of damages is the amount by which the market value of the new shares at the time they were issued exceeds the par value thereof, with interest on the excess. Gray v. Portland Bank, 3 Mass. 364; s. c. 3 Am. Dec. 156; Reese v. Bank of Montgomery, 31 Pa. St. 78; s. c. 72 Am. Dec. 726; Eidman v. Bowman, 58 Ill. 444. Each shareholder must sue in his own name only, the liability of the corporation in these cases being several and not joint. Dousman v. Wisconsin &c. Co., 40 Wis. 418; Williams v. Savage Manuf. Co., 3 Md. Ch. 418.

¹ Ohio Ins. Co. v. Nunnemacher, 15 Ind. 294, 296; s. c. 10 Ind. 234.

² Reese v. Bank of Montgomery, 31

Pa. St. 78; s. c. 72 Am. Dec. 726; 26 & 27 Vic. ch. 118, § 17.

³ Miller v. Illinois &c. R. Co., 24 Barb. 312, 330.

⁴ Jones v. Morrison, 31 Minn. 140.

⁵ Brown v. Florida Southern Ry. Co., 19 Fla. 472; Hart v. St. Charles Street R. Co., 30 La. Ann. 758, where it is also held that a verbal notification by the shareholder that he will take the new stock is sufficient to render the company liable in damages for disposing of it to others; Terry v. Eagle Lock Co., 47 Conn. 141; Sewall v. Eastern R. Co., 9 Cush. 5. By the statute, in England, if the offer be not accepted within a month, it will be deemed to have been declined. But the directors are empowered to allow a shareholder who on account of absence abroad or other satisfactory cause omitted to signify his acceptance, to take the stock after the expiration of that time. 26 & 27 Vic. ch. 118, § 20.

holders, unless the vote in terms so provides.¹ The holders of scrip, convertible at a certain time into the stock of the company, are not entitled to share *pro rata* with the stockholders in an increase of stock made before the time for the conversion of the scrip certificates into stock.²

§ 475. **Liability of holders of the new shares.**—The recital in certificates issued to and received by old shareholders, that the shares were fully paid up and free from all claims and demands on the part of the company, can not relieve them from liability to creditors, even if valid against the corporation.³ In a recent case after an irregular increase was made in the capital stock, a portion of the new shares was distributed among the stockholders, upon the understanding that they were the owners of the new stock in proportion to the amounts they respectively held of the old, and the certificates issued to them recited that the stock was paid up. The corporation then became indebted to complainants, who had notice of the increase of the capital stock, but not of the disposition made of it, and afterwards the corporation became insolvent. Upon this state of facts, the stockholders were held to be liable to complainants for the full amount of the new stock so issued to them, and not paid for; the capital stock being a trust fund for the benefit of creditors.⁴ While these stockholders entered into no express undertaking to pay for these shares, but intended and expected to receive and hold them as fully paid, in accordance with the recital of the certificates issued therefor, still this acceptance and holding of the certificates until the insolvency of the company operates to impose upon them the legal obligation to pay up the shares in order to discharge the demands of creditors.⁵ There is no difference in principle between making a stockholder

¹ *Mason v. Duval Mills*, 132 Mass. 76.

² *Pratt v. American Bell Telephone Co.*, 141 Mass. 225; s. c. 55 Am. Rep. 465; *Miller v. Illinois Central R. Co.*, 24 Barb. 312.

³ *Hawley v. Upton*, 102 U. S. 316; *Stutz v. Handley*, (1890) 41 Fed. Rep. 332; s. c. 7 Ry. & Corp. L. J. 407.

⁴ *Stutz v. Handley*, (1890) 41 Fed.

Rep. 332; s. c. 7 Ry. & Corp. L. J. 407.

⁵ *Stutz v. Handley*, (1890) 41 Fed. Rep. 332; s. c. 7 Ry. & Corp. L. J. 407; *Upton v. Tribilcock*, 91 U. S. 47, 48, where the shareholder had paid twenty per cent. of the shares, and the certificate, issued to him for the whole amount, had stamped across its face the word "Non-assessable."

pay a larger per cent. on his shares than he has expressly agreed and undertaken to pay, and compelling a shareholder to pay up the whole amount represented by certificates which he has accepted, and holds under contract as paid-up shares, but which have not in fact been paid. If the unpaid balance may be reached and subjected to the payment of corporate debts, in disregard of the contract, why may not the unpaid whole of outstanding shares be likewise reached and subjected, notwithstanding the agreement that they should be treated or considered as fully paid?¹

The court held that "the acceptance and holding of a certificate of shares in an incorporation makes the holder liable to the responsibilities of a shareholder." The legal effect of the certificate was to make the remaining eighty per cent. payable on demand. The court said: "We see no qualification of this result in the word 'non-assessable,' assuming it to be incorporated into and to form a part of the contract. It is quite extravagant to allege that this word operates as a waiver of the obligation, created by the acceptance and holding of a certificate, to pay the amount due upon the shares. A promise to take shares of stock imports a promise to pay for them. The same effect results from an acceptance and holding of a certificate." The rule thus laid down was re-affirmed in the subsequent cases of *Sanger v. Upton*, 91 U. S. 64; *Webster v. Upton*, 91 U. S. 67, 71; *Chubb v. Upton*, 95 U. S. 666; *Hawley v. Upton*, 102 U. S. 316.

¹ *Stutz v. Handley*, (1890) 41 Fed. Rep. 332; s. c. 7 Ry. & Corp. L. J. 407. So in *Hawley v. Upton*, 102 U. S. 316, the shareholder's express written agreement with the corporation was to pay \$200 (or twenty per cent. of its par value) for ten shares of the increased stock. As between him and the corporation, this would

have been held valid, but as against creditors it was held not binding, and he was required to pay up the remaining eighty per cent., the court saying that "as the company could not sell its stock at less than par, what was done amounted in law to a subscription for the stock, and nothing else. It is true the stock he took purported to be non-assessable; but that, in law, could only mean that no assessment would be made beyond the percentage he had specially bound himself to pay, unless the legal liabilities of the company required it." All the *Upton* Cases dealt with increased or new stock, and the Supreme Court, in favor of the representative of creditors, disregarded the special contracts made between the corporation and the shareholders, and compelled the latter to pay in full for their shares. To the same effect, see the well-considered case of *Flinn v. Bagley*, 7 Fed. Rep. 785. In harmony with the principle enforced in these cases is the decision of the Kentucky court of appeals in the case of *Haldeman v. Ainslie*, 82 Ky. 395, in which the capital stock of the corporation, organized under the same general law as the *Clifton Coal Company*, was fixed at \$1,200,000; and it was provided, by section 5 of the articles of incorporation, that each subscriber,

§ 476. Liability upon new shares issued as a bonus.— This liability for the full amount represented by the unpaid stock, on the insolvency of the corporation, extends to persons to whom a portion of the new stock was issued as an inducement to purchase bonds of the corporation, though they, too, received certificates reciting that the stock was paid up, since their acceptance and holding of the stock is, in legal effect, a subscription therefor which imports a promise to pay.¹ An agreement

upon executing his note for \$1,000, payable in bank, and paying \$500 in cash, should become entitled to paid-up stock of four hundred shares (\$40,000). The private property of stockholders was exempt from liability for corporate debts, and the charter further provided that "the highest amount of indebtedness to which the corporation is at any time to subject itself shall be the sum of \$15,000." The managing officers contracted debts far beyond this limit, and the corporation became insolvent. The court held that creditors could compel the payment of the entire stock (of \$1,200,000), if necessary to satisfy their demands. The court says: "The effect of the limitation upon the amount to be paid by the subscribers for their stock would not exempt them from liability to a creditor who had dealt with a corporation in ignorance of the articles of association, limiting the amount of the indebtedness to be created by the corporation or those conducting it. . . . The public had the right to believe that each subscriber, taking four hundred shares of stock at \$100 per share, had either paid up his stock, or was liable for the amount; and when trusting the corporation upon the faith of its ability to pay, and without any knowledge as to the restrictions contained in the contract between the stockholders, a creditor of the corporation could compel the payment of

the entire stock, if necessary to satisfy his demand." The case of *Christensen v. Eno*, 106 N. Y. 97, was especially pressed as sustaining defendants' position in *Stutz v. Handley*, 41 Fed. Rep. 332, where, however, the court said: "That case is certainly an authority in favor of defendants, but it is not in harmony with the authorities above referred to. The facts of the case were that the Illinois & St. Louis Bridge Company issued to Eno twenty-five shares of its capital stock, upon which forty per cent. was not paid, but was credited as paid when the stock was issued. The complainant, a judgment creditor of the corporation, sought to compel Eno to pay up the unpaid forty per cent. toward the satisfaction of his debt. The court, following the English cases cited by counsel for defendant, and without even referring to the decisions of the Supreme Court of the United States, held that the creditors could not recover, because Eno had entered into no contract with the company to pay the unpaid forty per cent. I am unable to reconcile this decision with the principles announced and applied by the Supreme Court in the above-cited *Upton Cases*, which are binding upon and should be followed by this court." *Stutz v. Handley*, (1890) 41 Fed. Rep. 332.

¹*Stutz v. Handley*, (1890) 41 Fed. Rep. 332; s. c. 7 Ry. & Corp. L. J.

by which persons organizing a corporation are to have bonds of the corporation to an amount equal to the stock subscribed for, secured by mortgage on the corporate property, is illegal and void, and can not be enforced against the corporation, even though the rights of no creditors of the corporation are involved.¹ So far as the rights of creditors are involved and

407, where the court said: "On behalf of all the defendants who accepted and held certificates of the new stock, 'distributed' to them along with bonds, it is urged that they can not be held liable thereon to creditors, because they were in no sense subscribers for such stock, and entered into no contract and assumed no obligation to pay therefor. It is claimed for them that neither the company nor the old stockholders could enforce such a liability upon or against them, and that creditors can assert no better or superior rights. Assuming that the subscription paper of December 30, 1886, which stated that 'it is agreed that \$50,000 of the \$200,000 capital stock be distributed *pro rata* among the subscribers to the above bonds,' constituted a contract between the subscribers for the bonds and the corporation, rather than an agreement between themselves, made with the consent and approval of the old stockholders, are creditors, who dealt with the company without notice or knowledge of that arrangement, precluded from recovering of defendants who accepted and held certificates of stock thereunder? The property of the company was considered ample security for the payment of the bonds, and the distribution of stock to the subscribers for the bonds was, not in fact, or by the terms of the subscription paper, in any proper sense a sale of such stock at and for its market value."

¹Morrow v. Iron &c. Co., (1889)

87 Tenn. 262; s. c. 5 Ry. & Corp. L. J. 206. It was said by the court that "whether this 'basis of organization' be construed to be a contract whereby each subscriber to the stock was to be given a bond as a bonus, or each subscriber to the bonds was to be given paid-up stock as a bonus, or as an agreement by which each contributor to the capital stock was to receive the obligation of the company, secured by a primary mortgage, that he should be repaid the amount of his subscription with interest, such agreement would clearly be illegal and ineffective as to existing or subsequent creditors of the corporation, upon the ground that the payment for the stock was unreal and simulated, or that the bond had been issued upon no consideration;" citing *Sawyer v. Hoag*, 17 Wall. 610; and *Scovill v. Thayer*, 105 U. S. 143. And after approving of the principle of these cases, that the unpaid stock of a corporation constitutes a trust fund for the benefit of general creditors, which can by no contrivance or device be released, the court held that the legal effect of the scheme, by which every subscriber was to have bonds, and also stock of the company, each to the amount of the subscription, was to throw all the risks and hazards of the business upon the public, who should deal with the corporation; while the contributors were to reap all possible gains, and be secured against loss in the event the enterprise proved unprofitable. Such a

affected, precisely the same objection exists against the subscriber for bonds of corporations taking increased stock as a bonus that exists against the taking of original stock as a bonus, on one and the same consideration.¹

§ 477. Increase by stock dividends.—The capital stock of corporations may be increased by means of stock dividends which are the issue by a corporation, as a dividend, of new shares, which have been paid up by the transfer from the surplus or profit and loss account to the account representing capital stock, of a sum equal to their par value.² After a

contract was considered invalid, even as to the corporation.

¹ *Stutz v. Handley*, (1890) 41 Fed. Rep. 332; s. c. 7 Ry. & Corp. L. J. 407, where the court continued: "In each case the party thus dealing with the corporation seeks, on the payment or contribution of one amount, to acquire both a debt against the company and a *pro rata* share and interest in the enterprise, without risk to himself. The legal effect of such an arrangement, either as to increased or original stock, is an undertaking on the part of the corporation to return or repay his contribution or loan, with interest, confer upon him all the rights of a shareholder, and exempt him from all obligation to account for the trust fund represented by his share. The transaction casts upon the public, dealing with the corporation, all the risks and hazards of the enterprise; and allows the holders of the shares, while reaping all the benefits and advantages of its success without liabilities for losses, to call for and require a re-payment of his advance. The settled principles of the law, which impress upon the capital stock of a corporation the character of a trust fund, and establish trust relations between holders of such stock while unpaid, and creditors of

the corporation, will not sanction such a contract when the rights of creditors are involved. In this respect no valid distinction exists between original and new stock. The Supreme Court in *Chubb v. Upton*, 95 U. S. 667, places the increased stock of a corporation upon the same footing as the original stock, and has steadily refused, as against creditors, to recognize any disposition thereof which could not have been made of the original stock. The settled doctrine of that court is that creditors without notice are not affected by any arrangement or device between the corporation and those accepting shares of its stock which fall short of actual payment therefor in good faith. In *Sawyer v. Hoag*, 17 Wall. 618, 619, the transaction was valid as between the corporation and the shareholders, but was held invalid as against the representatives of creditors."

² "Stock Dividends and their Restraint," by M. Dwight Collier, (1884) 7 Am. Bar Assoc. Reps. 268. In *Williams v. Western Union Tel. Co.*, 93 N. Y. 189, a stock dividend has been sustained on the grounds that there was no statute in the State prohibiting it. Such dividends do not affect the title of the property or transfer any legal consideration of

stock dividend, a corporation has just as much property as it had before. It is just as solvent, and just as capable of meeting all demands upon it. After such a dividend, the aggregate of the stockholders own no more interest in the corporation than before. The whole number of shares before the stock dividend represented the whole property of the corporation, and after the dividend they represent that and no more. A stock dividend does not distribute property but simply dilutes the shares as they existed before.¹ The English cases decided that profits and dividends must be paid in cash; but the leading American case has stated the rule to be that they may be declared and divided in property, if the property be capable of division. And if the profits have been invested in other property necessary for the use of the corporation which can not be divided in kind, then a dividend may be declared, based upon these profits, or the corporation may borrow money on the faith of them and divide it.² The money earned by a corporation is corporate property, and not the separate property of the stockholders, unless and until distributed among them by the corporation. In the absence of any restraining statute, the corporation may treat it either as an increase of its property or as profits of its business.³

§ 478. The power to issue stock dividends.—The power to issue stock dividends, however, depends upon the company having authority to increase its capital stock or upon all the original shares not having been issued.⁴ Subject to this restriction

property from the receiver to the corporation. They are merely changes of the entries in the books of the company. See generally, *State v. Baltimore &c. R. Co.*, 6 Gill, 363; *City of Ohio v. Cleveland &c. R. Co.*, 6 Ohio St. 489; *Rand v. Hubbell*, 115 Mass. 461, 474; *Boston &c. R. Co. v. Commonwealth*, 100 Mass. 399; *Miller v. Illinois Central R. Co.*, 24 Barb. 312; *Commonwealth v. Pittsburgh &c. R. Co.*, 74 Pa. St. 83; *Barton's Trust*, L. R. 5 Eq. 239; *Howell v. Chicago &c. R. Co.*, 51 Barb. 378; *Clarkson v. Clarkson*, 18 Barb. 646;

Gordon v. Richmond &c. R. Co., 78 Va. 501. But instead of paying the stock dividend to the shareholders it may be issued to the corporation and be sold for its benefit. *Jones v. Morrison*, 31 Minn. 140.

¹ *Williams v. Western Union Tel. Co.*, (1883) 93 N. Y. 189.

² *Williams v. Western &c. Co.*, 93 N. Y. 189; *Beers v. Bridgeport &c. Co.*, 42 Conn. 24.

³ *Rand v. Hubbell*, 115 Mass. 474.

⁴ *Howell v. Chicago &c. R. Co.*, 51 Barb. 378; *Leland v. Hayden*, 102 Mass. 542; *Deland v. Williams*, 101

and to the further restriction that every dollar of new stock shall represent an equal increase in the value of the corporate property,¹ the discretion of the directors herein is uncontrollable by the courts.² A stock dividend is exceptional in its character, and the objections to it as bearing upon the value of the stock, address themselves more to the managers than to the court.³ But a gratuitous distribution of stock upon no increase of value in the corporate property, a mere inflation, or, to use a phrase much in vogue, a "watering of stock," is condemned by law.⁴ The holders of preferred stock are entitled to share equally with common stockholders in a distribution of stock dividends.⁵ Scrip certificates of debt, representing profits earned by the corporation and issued to its stockholders, convertible into stock when authority to increase the stock shall be obtained, belong to the life-tenants of the stock, who are entitled to the income and profits thereof.⁶

Mass. 571; *Boston &c. R. Co. v. Commonwealth*, 100 Mass. 399; *Minot v. Paine*, 99 Mass. 101; *Atkins v. Albree*, 12 Allen, 359. The Western Union Telegraph Co. contracted with two other companies to purchase their property and franchises, and to pay for the same with a part of an addition of capital stock, the rest of the addition to be paid to its stockholders as a stock dividend, and it was held, that the New York statutes concerning telegraph companies conferred ample power to increase the stock and to make the purchase, it appearing that the property purchased was worth the price, and that nothing in the law or in the principles of public policy prohibited the stock dividend ordered to be paid to stockholders, the amount of the dividend not exceeding the value of the surplus. *Williams v. Western Union Telegraph Co.*, 93 N. Y. 162, overruling *Hatch v. Western Union Tel. Co.*, 9 Abb. N. C. 430, which declared that accumulated earnings on which no dividend has been declared, furnish no consideration for issuing

stock to be divided among the stockholders, and that such a dividend would be *ultra vires*.

¹ *Williams v. Western Union Tel. Co.*, (1883) 93 N. Y. 189; *Howell v. Chicago &c. Ry. Co.*, 51 Barb. 378; *Bailey v. Railroad Co.*, 22 Wall. 604.

² *Williams v. Western Union Tel. Co.*, (1883) 93 N. Y. 192; *Terry v. Eagle &c. Co.*, 47 Conn. 141, holding that a vote to issue a stock dividend may be revoked at any time before the certificates are issued. Cf. *Howell v. Chicago &c. R. Co.*, 51 Barb. 307, holding that the courts of one State will not inquire into the legality of an issue of stock dividends by a corporation deriving its origin from another State.

³ *Howell v. Chicago &c. R. Co.*, 51 Barb. 307.

⁴ *Williams v. Western Union Tel. Co.*, (1883) 93 N. Y. 189.

⁵ *Phillips v. Eastern R. Co.*, 138 Mass. 122; *Gordon v. Richmond &c. R. Co.*, 78 Va. 501.

⁶ *Appeal of Philadelphia Trust. Safe Deposit &c. Ins. Co.*, (Pa. 1889) 16 Atl. Rep. 734.

§ 479. Prohibitions of stock dividends.— There are many statutes and constitutional provisions in the American States prohibiting the fictitious issue and increase of corporate stock.¹ Some of these provisions do not specifically mention stock dividends; but a prohibition of the issue of stock except for labor done, or money or property actually received, is held to forbid the gratuitous issue of new shares even though representing an increase in the value of the corporate property.² But the Massachusetts act, above cited, is held not to prohibit a company from purchasing its own shares and distributing them among its shareholders.³ The prohibition in the California constitution is held to be self-enforcing and to require no statute to render it effective.⁴

§ 480. Reduction of capital stock — (a) Authority necessary.— The capital stock of a corporation can not be reduced except by express legislative authority.⁵ Thus a provision that for the better conduct and management of the affairs of the company, it should be lawful for a special general meeting called for the purpose, from time to time, to amend, alter or annul, either wholly or in part, all or any of the clauses of the deed, or of existing regulations and provisions of the company, does not authorize a reduction of the number and value of the shares of the company.⁶ Where a constitution and the law thereunder provide for the increase of the stock of corporations, but are silent as to a decrease, the power to decrease

¹ The New York "Stock Corporation Law of 1890," N. Y. Laws of 1890, ch. 564, § 42; Ark. Const. (1874) art. xii; Pa. Const. art. xvi, § 7; Ala. Const. art. xiii, § 6; Mo. Rev. Stat. 927; N. H. Gen. Stat. ch. 134, § 8; Wis. Rev. Stat. (1878) § 1753, as amended by Laws of 1881, ch. 93; Mass. Pub. Stat. ch. 112, § 61; Stimson's Am. Stat. Law, (Jan. 1, 1886) § 452, citing the constitutions of California, Alabama, Colorado, Louisiana, Missouri and Texas, as to corporations in general; and the constitutions of Illinois and Nebraska as to railway companies.

² *Fitzpatrick v. Dispatch &c. Co.*, (1887) 83 Ala. 604.

³ *Commonwealth v. Boston &c. R. Co.*, (1886) 142 Mass. 146.

⁴ *Ewing v. Oroville Min. Co.*, 56 Cal. 649, construing Cal. Const. art. xii, § 11.

⁵ *Seignouret v. Home Ins. Co.*, (1885) 24 Fed. Rep. 332; s. c. 25 Am. L. Rep. 29.

⁶ *Smith v. Goldsworthy*, 4 Ad. & E. N. S. 430; *Droitwich &c. Co. v. Curzon*, L. R. 3 Exch. 35; *In re Ebbw Vale &c. Co.*, 4 Ch. Div. 827; *In re Financial Corporation*, L. R. 2 Ch. 714; *Society v. Abbott*, 2 Beav. 559; *Grangers' &c. Co. v. Kamper*, 73 Ala. 325; *Salem Mill Dam v. Ropes*, 6 Pick. 23.

the stock is intentionally denied.¹ Nor does a statute giving authority to make modifications, additions or changes in their act of incorporation, or to dissolve it, with the assent of three fourths of the stock, confer upon them power to reduce the capital stock.² Even the power to dissolve does not carry the power to change the capital stock. Reducing the capital stock is practically the dissolution of the company and the organization of a new company.³ Persons dealing with the corporation, its creditors, the public at large and the stockholders themselves are interested in the preservation of the capital stock intact.⁴ A decrease of capital stock affects injuriously more parties and interests than an increase thereof could do, an increase being generally considered to be beneficial to shareholders and creditors alike — to the former as tending to diminish and not to add to their individual risks; to the latter as increasing the amount of their security.⁵

§ 481. (b) **By purchase of shares.**—Of course a company may accomplish a reduction by purchasing and extinguishing its own shares, where it has authority to buy them.⁶ This, however, does not necessarily reduce the capital stock, unless so intended, nor extinguish the shares bought in; for they may be sold and reissued at any time.⁷ A statute which au-

¹ *Seignouret v. Home Ins. Co.*, (1885) 24 Fed. Rep. 332; *Sutherland v. Alcott*, (1884) 95 N. Y. 93.

² *Seignouret v. Home Ins. Co.*, (1885) 24 Fed. Rep. 332; s. c. 25 Am. L. Reg. 29.

³ *Seignouret v. Home Ins. Co.*, (1885) 24 Fed. Rep. 332.

⁴ Creditors and customers have a claim to the preservation of the capital of a bank in its original integrity, upon the faith of which the notes of the institution are issued, money is deposited and paper is lodged for collection. So has the public on account of the advantages which the legislature has stipulated the bank should afford, as a consideration for the immunities and privileges which the charter confers. So have stockholders, on account of the profits which they have a right to expect on

the investments they have respectively made. *Percy v. Millaudon*, 3 La. 569.

⁵ *Seignouret v. Home Ins. Co.*, (1885) 24 Fed. Rep. 332; *Green's Brice's Ultra Vires*, 160.

⁶ *Taylor v. Miami Exporting Co.*, 6 Ohio, 176; s. c. 5 Ohio St. 162; s. c. 22 Am. Dec. 785; *City Bank v. Bruce*, 17 N. Y. 507; *Currier v. Lebanon Slate Co.*, 56 N. H. 262; *State v. Smith*, 48 Vt. 266; *Williams v. Savage Manuf. Co.*, 3 Md. Ch. 418.

⁷ *Taylor v. Miami Exporting Co.*, 5 Ohio, 162; s. c. 22 Am. Dec. 785; s. c. 6 Ohio, 176; *Vail v. Hamilton*, 85 N. Y. 453; *City Bank v. Bruce*, 17 N. Y. 507; *Ex parte Holmes*, 5 Cow. 426; *State Bank v. Fox*, 3 Blatchf. 431; *American Ry. Frog Co. v. Haven*, 101 Mass. 398; *Commonwealth v. Boston &c. R. Co.*,

thorizes a corporation at any meeting called for the purpose, to reduce its capital stock and the number of shares therein, does not empower it to effect a reduction by purchasing shares of a particular subscriber. Unless such a course is adopted as will work exact and even justice to all the owners of stock, the statute is inoperative.¹ Therefore when the transaction would operate for the relief and benefit of those from whom the stock is purchased and would increase the liability of the remaining stockholders, it is invalid.²

§ 482. (c) **By refunding.**—A company may refund to its stockholders a definite portion of each share, and thereby effect a reduction of its capital stock.³ The New York "Stock Corporation Law" of 1890 provides that if the capital stock of any corporation is reduced, the amount of capital over and above the amount of the reduced capital shall be returned to the stockholders *pro rata* at such times and in such manner as the directors shall determine.⁴ In construing a similar act, it has been said by the New York appellate court, that the objects sought to be obtained by the enactment were the protection of corporate creditors, and the assurance of a fund sufficient to carry out the corporate purposes, and it permits a reduction where either it was originally fixed at too high a sum or has become impaired, so that the nominal exceeds the actual sum. It does not, therefore, permit the distribution among stockholders of a sum equal to the difference between the nominal and the reduced capital, although if that sum may be taken out and yet leave the capital of the company unimpaired and the creditors secure, it may be divided among shareholders as a surplus entitled to be distributed in dividends.⁵ Upon a reduction being made, however, the share-

(1886) 142 Mass. 146; *State v. Smith*, 48 Vt. 266; *Williams v. Savage* Manuf. Co., 3 Md. Ch. 418; *Currier v. Lebanon Slate Co.*, 56 N. H. 262; *Chetlain v. Republic Life Ins. Co.*, 86 Ill. 220. *Cf. Percy v. Millaudon*, 3 La. 568, 587; s. c. 17 Am. Dec. 196.

¹ *Currier v. Lebanon Slate Co.*, 56 N. H. 262; *Gill v. Balis*, 72 Mo. 424; *Chetlain v. Republic Life Ins. Co.*, 86 Ill. 220; N. H. G. S. c. 354, § 6.

² *Currier v. Lebanon Slate Co.*, 56 N. H. 262.

³ *Currier v. Lebanon Slate Co.*, 56 N. H. 262.

⁴ N. Y. Laws of 1890, ch. 564, § 46.

⁵ *Strong v. Brooklyn &c. R. Co.*, (1883) 93 N. Y. 426. In this case a corporation, by proceedings under the statute, reduced its capital stock and issued to stockholders certificates of indebtedness for the ap-

holders may properly claim a distribution of the money which the corporate body, on account thereof, has no longer the right to use as capital.¹

§ 483. Loss of property not a reduction of capital stock.

In case of a loss of property it is held that a reduction of capital stock which amounted to a mere writing off of the loss, is not a reduction of the company's capital within the meaning of statutes authorizing a reduction.² Thus, where since the organization of a corporation the capital had been nominal, to the extent that only by estimation had the actual capital of the company been equal to the par value of the shares, and it was proposed to write off the par value of the shares so that the par value and the estimated value might be equal, the actual capital not being affected, the actual stock being the same after the proposed action as before, it was said that the writing off the value of shares was such an infringement of the rights of property as could only be accomplished by consent or a clear power given in the charter. It could not be lawful over the protest of dissenting stockholders.³

§ 484. Liability of shareholders after reduction.—The liability of shareholders as affected by an increase or reduction of the capital stock has been already treated in a previous chapter.⁴ The recent "Stock Corporation Law" of New York, enacts with respect to reduction of capital stock that the amount of the company's debts and liabilities shall not exceed the amount of its reduced capital, and that the owner of any stock shall not be relieved from any liability existing

parent amount of the reduction. The owners of all but one hundred shares out of four thousand accepted the certificates, and it was held, upon the application of the owner of a part of the hundred shares to have the issue declared illegal, that although the act probably contemplated a reduction of capital stock only in cases where the capital had become impaired, and, in such case, a distribution such as was herein attempted would be illegal, yet as, in the suit at bar, the corporation had on hand capital sufficient for the payment of all its debts after making the distribution, no reason existed why it should not be permitted, even conceding the certificates to have been illegally issued.

¹ Seeley v. New York &c. Bank, 78 N. Y. 608, affirming s. c. 8 Daly, 400.

² *In re Ebbw Vale &c. Co.*, (1877) 4 Ch. Div. 832.

³ *Seignouret v. Home Ins. Co.*, (1885) 24 Fed. Rep. 332; s. c. 25 Am. L. Reg. 29.

⁴ *Vide supra*, § 142.

the suit at bar, the corporation had

prior to such reduction.¹ Where capital stock has been only partially paid in, it is not permissible to reduce the nominal capital to the sum actually paid. Even in a case where there was apparent statutory authority so to do, it was said that if such a proceeding were permitted, the shareholders' liability would be limited not, as was intended, by the amount of their shares, but by the amount of the already paid-up portion of their shares. Justice, the language of the act, and the intention of the legislature, alike forbids an interpretation which would lead to such a result.² Where directors have increased their capital stock by resolution, as empowered by their charter, they can not afterwards, even at the unanimous request of the stockholders, rescind their vote increasing the stock, so as to accomplish a reduction from the figure first determined upon to one representing the amount of the stock subscribed, being a greater amount than that from which the increase was made.³

§ 485. Irregularly issued stock — How far valid.— The validity of irregularly issued stock is based upon its analogy to the case of a *de facto* corporation.⁴ If a corporation is authorized by law to increase its capital stock, upon complying with certain prescribed forms or conditions, and the corporation or its agents appear to have endeavored to comply with the prescribed forms or conditions, and have in fact increased the company's capital stock by issuing new shares, on the assumption that the legal right to increase the capital stock had

¹ N. Y. Laws of 1890, ch. 564, § 44. In case of a reduction of the capital stock, except of a railroad corporation, the certificate thereof shall have indorsed thereon the approval of the comptroller, to the effect that the reduced capital is sufficient for the proper purposes of the corporation, and is in excess of its debts and liabilities, and that the actual market value of the stock before reduction was less than its par value. N. Y. Laws of 1890, ch. 564, § 46.

² *Droitwich & Co. v. Curzon*, (1867) L. R. 3 Ex. 42.

³ *Sutherland v. Olcott*, (1884) 95 N. Y. 98.

⁴ *Scovill v. Thayer*, 105 U. S. 143; *Chubb v. Upton*, 95 U. S. 667, where it is said that "if it be conceded that its increased stock is but *de facto*, and that it could have been annulled or suppressed by the action of the attorney-general as acting under an irregular organization, the defendant derives no aid from the admission. The cases cited are clear to the point that he can not make the objection, but must perform the engagement he has made."

been acquired, and if the holder of the new shares has acted as a shareholder, and enjoyed the rights of a shareholder, then the creation of the new shares will be recognized by the courts, and given effect according to the intention of the parties, although the statutory forms or conditions were not complied with, and no legal right to create the new shares was in fact obtained.¹ Therefore where a corporation has by its charter the power to increase its capital stock, its stockholders, who have acquiesced in such an increase and received the stock issued thereupon, when sued by a creditor of the corporation for the amount unpaid on their shares, are estopped to say that the increase was invalid because it was not published and recorded as required by the general law under which it was made.² Being invested with authority of law to make an increase of its capital stock, it is settled by the decisions, especially of the federal Supreme Court, that neither the corporation, nor stockholders who accept such increased stock, can, after the insolvency of the company, question its validity as against creditors, for any failure or neglect on the part of the company to do some other act, the performance of which rested or depended upon itself. There is a clear distinction between the power to make an increase of stock and the formality to be observed or act to be subsequently performed by the corporation in the exercise of such power. A want of power or lawful authority will defeat or render void an attempted increase, while irregularities in the exercise of conceded power are never allowed to invalidate such stock, or to furnish the holders thereof an available defense against liability thereon. Where the power to increase its capital stock exists, and is exercised, the corporation's failure to perform some act devolving upon itself, in connection therewith, such as recording and publishing its action, constitutes an irregularity or neglect of duty of which the State only can complain or take advantage in a direct proceeding against the corporation; but stockholders who have accepted portions of such increased stock are estopped from denying the validity of the

¹ Morawetz on Corporations, § 763; Rep. 531; s. c. 7 Ry. & Corp. L. J. quoted in *Stutz v. Handley*, (1890) 407; *Walton v. Riley*, (1887) 85 Ky. 413, overruling *Heinig v. Adams & Co.* 41 Fed. Rep. 531.

² *Stutz v. Handley*, (1890) 41 Fed. Manuf. Co., 81 Ky. 300.

increase upon any such irregularity or neglect. This is clearly settled by what are known as the Upton Cases.¹

¹ *Upton v. Tribilcock*, 91 U. S. 45; *Sanger v. Upton*, 91 U. S. 56; *Webster v. Upton*, 91 U. S. 65; *Chubb v. Upton*, 95 U. S. 665; *Pullman v. Upton*, 96 U. S. 328; and *Casey v. Galli*, 94 U. S. 673; *Stutz v. Handley*, (1890) 41 Fed. Rep. 531; s. c. 7 Ry. & Corp. L. J. 407. The principles announced in these cases are not in anywise modified or affected by the subsequent decision of *Scovill v. Thayer*, 105 U. S. 148, in which the distinction between the want of power to make an increase, and irregularities or informalities in the exercise of a conceded power, as above suggested, is illustrated and applied. *Stutz v. Handley*, (1890) 41 Fed. Rep. 531; s. c. 7 Ry. & Corp. L. J. 407. In *Scovill v. Thayer*, 105 U. S. 143, by the law of Kansas, the power of the company to increase its stock was expressly limited and confined to double the amount originally authorized. The attempted increase was in excess of that amount. It was held that such excess was void, and conferred no right and imposed no liability upon the holders thereof, upon the ground that there was a want or lack of power on the part of the company to make such an increase. For this reason, those who received certificates for such unauthorized stock, although they attended corporate meetings, were held not to be estopped from disputing its validity. The Supreme Court, speaking by Mr. Justice Woods, say: "We think he (the holder of such stock) is not estopped to set up the nullity of the unauthorized stock. It is true that it has been held by this court that a stockholder can not set up informalities in the issue of stock which the

corporation had the power to create;" citing the Upton Cases. "But those were cases where the increase of the stock was authorized by law. The increase itself was legal, and within the power of the corporation, but there were simply informalities in the steps taken to effect the increase. These, it was held, were cured by the acts and acquiescence of defendant; but here, the corporation being absolutely without power to increase its stock above a certain limit, the acquiescence of the shareholder can neither give it validity nor bind him or the corporation." The reason for the distinction thus indicated is founded upon the principle that a corporation has no inherent authority of its own motion, or by its own action, to effect fundamental changes in its constitution or organic law, such as an increase in its capital stock involves. It is an essential prerequisite or condition precedent to the validity of such a change that the sovereign by whom the corporation is created, or under whose law it is organized, shall give its consent thereto, either in the company's charter, or by some general or special act. But when such authority is conferred, those who accept stock under the exercise of the power by the corporation are not allowed to shield themselves from liability in respect thereto by setting up the failure on the part of the company or of themselves to perform any subsequent act or duty resting within its or their own control, such as making, recording, or publishing a certificate of such corporate action. *Stutz v. Handley*, (1890) 41 Fed. Rep. 531; s. c. 7 Ry. & Corp. L. J. 407.

§ 486. **The same subject continued.**—It can not now be denied that if a corporation having power to issue stock certificates does in fact issue such a certificate, in which it affirms that a designated person is entitled to a certain number of shares of stock, it thereby holds out to persons who may deal in good faith with the person named in the certificate that he is the owner and has capacity to transfer the shares. This does not rest on any view of the negotiability of stock, but on the general principle appertaining to the law of estoppel. The certificate itself must be regarded as a continuous representation of the ownership of the holder; it is equivalent to an affirmative answer to an inquiry made at the office of the company.¹ Accordingly a corporation whose agents have issued spurious stock is answerable where the directors of the corporation have either authorized, or by their negligence allowed, the fraud to be perpetrated; but not otherwise.² Thus it has been held that a corporation was liable for money advanced to the treasurer upon certificates of shares of stock of the company, signed in conformity with its resolutions and issued to the treasurer himself, although they were in fact spurious and fraudulently issued, it appearing that they were taken by the plaintiff in good faith.³ And where a corporate agent is clothed with authority, either by direct appointment or by recognition and ratification, or by actual enjoyment of the fruits of his acts, or by long acquiescence therein from which a presumption of implied agency arises, the issuing of the certificates by him must be held to be within the scope of the real and apparent authority which he possessed; and the remedy of the shareholders is not prejudiced by the fact that the agent used and intended to use the avails for his own purpose.⁴ In such cases, where the condition upon which the agent can issue a certificate of stock is a transfer on the books

¹ *Holbrook v. New Jersey Zinc Co.*, 61 N. Y. 280; s. c. 5 Lans. 250; *People v. Parker & Co.*, 10 How. Pr. 551.

² *New York & C. R. Co. v. Schuyler*, (1865) 34 N. Y. 30. See, however, *New York & C. R. Co. v. Schuyler*, (1865) 34 N. Y. 30, 64; *Bradley v. Richardson*, 2 Blatchf. 343; s. c. 23 Vt. 720; *Tome v. Parkersburg Branch R. Co.*, 39 Md. 36, 87; *Ang. & Ames on Corp.* 216; *Story on Agency*, § 54.

³ *Titus v. Great Western & Co.*, 61 N. Y. 280; s. c. 5 Lans. 250; *People v. Parker & Co.*, 10 How. Pr. 551.

and the surrender of a previous certificate, if any had before been issued, these facts are wholly extrinsic and peculiarly within the knowledge of the agent as part of the special duties to be attended to by him, and are represented by him to exist by the certificate itself. Where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such an agent in entire good faith, pursuant to an apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice.¹

§ 487. **False certificates.**—It is the general rule that a corporation is estopped to deny the validity of certificates issued in proper form under its seal, and duly signed by the officers authorized to issue certificates, if they are held by persons who took them for value without knowledge or notice that they had been fraudulently issued.² Thus where a clerk of a

¹ *New York &c. R. Co. v. Schuyler*, (1865) 34 N. Y. 30.

² *Allen v. South Boston R. Co.*, (1889) 150 Mass. 202, citing *Moore v. Citizens' Nat. Bank*, 111 U. S. 156; *Boston &c. R. Co. v. Richardson*, 135 Mass. 473; *Machinists' Nat. Bank v. Field*, 126 Mass. 345; *Pratt v. Taunton &c. Co.*, 123 Mass. 110; *New York &c. R. Co. v. Schuyler*, 34 N. Y. 30, 64; *Titus v. Great Western Turnpike*, 61 N. Y. 237, 245; *Holbrook v. New Jersey Zinc Co.*, 56 N. Y. 616; *Shaw v. Port Philip &c. Co.*, 13 Q. B. Div. 103. In a later case this rule was applied upon the following state of facts: The treasurer of a corporation authorized a broker to sell a number of shares of the stock for him. Plaintiff purchased the shares, receiving from the broker a power of attorney in blank authorizing the transfer of the shares to him. He presented the power of attorney to the treasurer, who filled in the purchaser's

name, and his own name as attorney, and thereupon issued to plaintiff the number of shares called for, entering in the transfer book a transfer of the shares from himself, as treasurer, to the broker, and the transfer from the broker to plaintiff. The shares issued to plaintiff were a fraudulent overissue. The president of the corporation was in the habit of leaving blank certificates signed by him with the treasurer, and the shares thus issued to plaintiff were entered on the dividend sheets, and also in the annual reports of the corporation, the footings being falsified to correspond to the authorized capital stock of the corporation. The fraudulent issue being discovered, the corporation refused to transfer or redeem the shares thus issued. And the holding was that, as the negligence of the officers of the corporation made the fraudulent overissue possible, the corporation was liable in damages to the plaintiff.

corporation fraudulently filled out a certificate for shares of its stock in the name of a fictitious person, procured the sig-

Allen v. South Boston R. Co., (1889) 150 Mass. 200. The next case in the same report, and involving one of the same series of transactions, indicates the boundary of the rule. The treasurer of a corporation, being also engaged in business as a broker, was employed by plaintiff to purchase a number of shares of stock in the corporation. He informed plaintiff that he had purchased the stock, and delivered to her a certificate therefor. He entered in the transfer book of the corporation a transfer of the stock to plaintiff from himself as agent. In fact, he had no stock as agent or otherwise, all the stock of the corporation having been previously issued, and the issue to plaintiff was a fraudulent overissue. The court considered, therefore, that the fraud on the part of the treasurer being for his own benefit, and against the plaintiff as well as the corporation, plaintiff could not be charged with knowledge thereof, on the ground that he was acting as her agent in the purchase of the stock. *Craft v. South Boston R. Co.*, (1889) 150 Mass. 207. Where the signatures of the president and treasurer of a company were left with a clerk, a son of the treasurer, during the enforced absence of these officials, the clerk forged the name of the treasurer of the Safe Deposit Company to the receipt for coupons which was attached to the funding certificate issued by the company and negotiated by them with persons aware of the fact that he held the position of clerk. It may be conceded, the court said, and was doubtless the case, that the agent had no authority in fact to issue such certificates; he had no real authority as between

himself and his principal, or other parties cognizant of the facts, for doing the particular acts complained of. But the company by its own act, and, as it turned out, misplaced confidence, placed the agent in a position to do, and procure to be done, that class and description of acts to which the particular acts in question belong; and in such case, where the particular acts in question are done in the name of and apparently on behalf of the principal, the latter must be answerable to innocent parties for the manner in which the agent has conducted himself in doing the business confided to him. Upon no other principle could the public venture to deal with an agent. In such case the apparent authority must stand as and for the real authority. *Western Maryland R. Co. v. Franklin Bank*, 60 Md. 36. But in an action brought to recover damages for fraudulent misrepresentations alleged to have been made by the defendant corporation through their secretary, it appeared that certain customers of the bank had applied to them for an advance on the security of transfers of debenture stock of the defendant company. The plaintiff's manager called upon the defendant's secretary, and was informed in effect that the transfers were valid, and that the stock which they purported to transfer existed. The plaintiff thereupon made the advances. It subsequently appeared that the secretary, in conjunction with another, had fraudulently issued certificates for debenture stock in excess of the amount which the company were authorized to issue, and the transfers concerning which the plaintiff inquired related to this

natures of the officers and negotiated it, signing the name of the fictitious person to the assignment and power of attorney on the back, and the transferee, buying it in good faith, obtained a transfer on the books and the issue of a new certificate to himself, it was held, in a suit in equity whereby the corporation sought to restrain the transfer of the certificate and compel its surrender, that it was estopped from denying its validity.¹ The argument that the president and treasurer can not by a fraudulent re-issue bind the company to that which it is powerless to perform might be unanswerable, if the power to give certificates were identical with the power to create stock. But it has been said, in answer, that while a certificate of stock is not a negotiable instrument, it is a written declaration that the holder has a definite share in the capital or profits of the concern, which, though delivered to him, is intended for circulation, and is virtually addressed to all the world; so that third parties who are misled by such instruments may justly require that the loss shall fall on the corporation and not on them.² In general, a party must be presumed to have notice of everything that appears upon the face of the instrument under which he claims title. But a transfer of stock can not, in this respect, be likened to an ordinary conveyance of real or personal property. The instrument transferring the title is not delivered to the party; the laws require it to be written on the books of the bank in which the stock is held; the party to whom it is transferred rarely, if ever, sees the entry, and relies altogether upon the certificate of the proper officer of the bank, stating that he is entitled to so many shares.³ The remedy of *bona fide* holders is precisely the same as if the board of directors had issued the same certificates in fraud of their powers under the law and obtained

overissue. And it was held that although what the secretary stated related to matters about which he was authorized to speak, he did not make the statements for the defendant but for himself. *British Banking Co. v. Charnwood &c. Ry. Co.*, (1887) 18 Q. B. Div. 714, reversing s. c. 34 W. R. 718.

¹ *Manhattan Beach Co. v. Harned*,

23 Blatchf. C. Ct. 494; s. c. 27 Fed. Rep. 484.

² *Willis v. Philadelphia &c. R. Co.*, 13 Phila. 34; *People's Bank v. Kurtz*, 99 Pa. St. 346.

³ *Lowry v. Commercial &c. Bank*, Taney's Dec. 316; *Salisbury Mills v. Townshend*, 109 Mass. 115; *Taylor on Corporations*, § 598.

the shareholders' money thereon.¹ The advice of legal counsel will not relieve a corporation from liability for improperly issuing stock.² It has been said, however, that where the surrender and transfer of the old certificate are prerequisite to the lawful issue of a new one, a transferee who accepts a new certificate without taking any steps to assure himself that this prerequisite to the validity of his certificate, which was to be fulfilled by the former owner and not by the company, had been complied with, can not, as against the company, stand in the position of one who receives certificates of stock from the proper officers without notice of any facts impairing its validity.³

§ 488. **Forged certificates.**—In the case of forged certificates, it is essential to public welfare, where the acts of acknowledged agents are accompanied with all the *indicia* of genuineness, and are issued for a valuable consideration, that the principal should be responsible, whether the *indicia* are

¹ New York &c. R. Co. v. Schuyler, 34 N. Y. 30, 64.

² Caulkins v. Gas-light Co., (1887) 85 Tenn. 683; s. c. 4 Am. St. Rep. 786.

³ Moores v. Citizens' Nat. Bank, 111 U. S. 156. This case has been severely criticised, on the ground that the provision in the by-laws and upon the face of the certificates provided solely that that certificate could only be transferred upon a surrender of that certificate and did not refer to prior certificates. Lowell on the Transfer of Stocks, § 112, n. The case most unreconcilable with the modern rule was one in which by-laws passed in conformity with the charter declared that all transfers of stock should be made in the transfer book, kept in the proper office; and where a certificate of stock had been issued, that the same should be surrendered before transfer made. It was shown that the agent of the defendant had fraudulently given to a *particeps criminis*

a certificate in the usual form for a certain number of shares of stock, when in fact the latter owned no stock, no certificate for such stock had been surrendered, and no stock stood in his name on the books. The plaintiff, in good faith, and in reliance upon the certificate as regularly issued and valid, made a loan upon and received the certificate, with an assignment of the stock, and a power of attorney to transfer the same. The court held the plaintiff was not entitled to recover. Mechanics' Bank v. New York &c. R. Co., 13 N. Y. 599. But it has been judicially said of this case that it was not decided "upon the ground that the plaintiffs were not in privity of dealing with the defendants by reason of the non-negotiable character of the certificates, and therefore could not sue for fraud." Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank, 16 N. Y. 151; s. c. 69 Am. Dec. 678.

true or not.¹ When certificates of stock contain apparently all the essentials of genuineness, a *bona fide* holder thereof has a claim to recognition as a stockholder, if such stock can legally be issued, or to indemnity, if this can not be done. The fact of forgery does not extinguish his right when it has been perpetrated by or at the instance of an officer placed in authority by the corporation and intrusted with the custody of its stock-books, and held out by the company as the source of information on the subject.²

¹ *Toine v. Parkersburg Branch & Co.* R. Co., 39 Md. 36; *North River Bank v. Aymar*, 3 Hill, 362; *Western Maryland R. Co. v. Franklin Bank*, 60 Md. 36; *Shaw v. Port Philip & Co.*, 13 Q. B. Div. 103. Thus where the secretary of a company without any authority affixed the seal of the company, which was in his custody, to certificates of stock, and either himself forged the signature of a director or procured it to be forged and issued it, the court said: "It is admitted on behalf of the defendant that, if there had been merely a false issue of the certificates in the absence of the directors, it would have bound the company. But it is contended that the present case differs from these because the director's name was forged, and that the secretary carried out this fraud by means of forgery. How does this make any difference? It is said that it does so because no decision has ever yet given validity to a forged document. It is asserted that there is a distinction between forgery and other fraud, but the court fail to see that it is so. A director is to sign every certificate and certain other formalities are to be observed. These formalities had in the present case apparently been observed. The person who receives the certificate knows whether he received it from the secretary, but he can not verify

the due observance of the other formalities. The company has therefore made it part of the duty of the secretary and within the scope of his authority to warrant the genuineness of each certificate he issues, and the plaintiff in this case is entitled to judgment. *Shaw v. Port Philip & Co.*, 13 Q. B. Div. 103.

² *Baltimore & Co. R. Co. v. Wilkins*, 44 Md. 28. F. & Co., stock-brokers, were requested by defendant's transfer clerk to sell a certificate for one hundred shares of defendant's stock purporting to stand in the name of B. The signatures of defendant's president and treasurer were genuine, and at defendant's request the certificate had been regularly countersigned and registered by the registrar of transfers. B., however, was a fictitious person, and the certificate was signed after all of defendant's stock had been issued and was in circulation. The transfer clerk had fraudulently receipted for the certificate in B.'s name on the books of the company, and had signed B.'s name on the back of the certificate. F. & Co., after ascertaining that the stock was properly registered, inquired at defendant's general transfer office, and were informed by its authorized agent that the stock was properly indorsed and that the agent was willing to make the transfer. Thereupon F. & Co. sold the stock,

§ 489. **Liability for fraudulent issue.**—Where stock is fraudulently overissued by the proper officer of a company the false certificates can not be regarded as valid stock, but *bona fide* holders of them are entitled to indemnity.¹ Thus where a bank has been held responsible although stock had been issued beyond the limit fixed by the charter, *bona fide* holders were entitled to indemnity, but not to become stockholders. The court said that the idea that the purchaser of stock was to lose the property he had honestly paid for, because the bank had not done its duty to itself, was unreasonable in the last degree.² The general rule is, therefore, that a *bona fide* purchaser of certificates for shares in a corporation, issued in due form by agents of the company having authority to issue such certificates under ordinary circumstances, can compel the corporation to recognize the certificate as valid and accord to him the rights of a shareholder, unless the creation of new shares is prevented by some legal prohibition; and if the shares which the certificate purports to represent can not legally be created, by reason of some legal prohibition, the purchaser is entitled to recover his damages from the corporation for the false representation contained in the certificate.³ So that "the incapacity to create the spurious stock

and gave a guaranty in compliance with a rule of the stock exchange, which was known to defendant, that, as between members, the seller of stock must guaranty to the purchaser the correctness of the certificate, and also of the transfer. *F. & Co.* duly accounted to the transfer clerk for the proceeds. When the fraud of the transfer clerk was discovered, they were compelled to take back the stock from their purchaser, and refund the purchase price. Upon these facts defendant was held liable to *F. & Co.*'s assignee for the damages. *Jarvis v. Manhattan Beach Co.*, (1889) 53 Hun, 362.

¹ *New York & C. R. Co. v. Schuyler*, (1865) 34 N. Y. 73, where it was held that although the initiative step in the proceedings may have been

taken by the corporation against the holders of overissued stock, praying its cancellation, a court of equity, having granted the relief sought by the plaintiff, will not stop there, but will proceed in the same case to grant the defendants damages against the plaintiff for the fraud practiced upon them by the corporate agents. *Pollock on Contracts*, § 94; *Simm v. Anglo-American Telegraph Co.*, 5 Q. B. Div. 188; *New York & C. R. Co. v. Schuyler*, (1865) 34 N. Y. 30; *In re Bahia & C. Ry. Co.*, L. R. 3 Q. B. 584, 595; *Daly v. Thompson*, 10 Mees. & W. 309; *Waterhouse v. London & C. Ry. Co.*, 41 L. T. N. S. 553.

² *Bank of Kentucky v. Schuykill Bank*, 1 Pars. Sel. Eq. Cas. 180.

³ *Morawetz on Corporations*, § 761;

would be no defense to an action for damages for the injury.”¹ To entitle the aggrieved party to sue on spurious stocks, no privity is necessary, except such as is created by the unlawful act and the consequential injury, because the injured party is not seeking redress upon the contract, but purely for the tortious act in the commission of which the contract is an accidental incident.² Defenses by a corporation that certificates were not issued in conformity with the charter or by-laws are not considered with favor by the courts. But where the charter provides that certificates of stock should be signed by the president, directors and treasurer, fraudulent overissues signed by president and treasurer alone were not sufficient to charge the corporation.³ In the case of a fraudulent overissue of stock by the proper officer of a corporation, a joint action will lie against the company and the agent,⁴ or a separate action against either.⁵

§ 490. Overissued stock.— Overissued stock may, it seems, be legalized by a subsequent legal increase of the capital.⁶ For example, where directors took it upon themselves to issue

Taylor on Corporations, § 591; Bridgeport Bank v. New York &c. R. Co., 30 Conn. 231, (one of the Schuyler fraud cases); Hall v. Rose Hill &c. Road Co., 70 Ill. 673; Mandelbaum v. North-American Mining Co., 4 Mich. 465; Wright's Appeal, 99 Pa. St. 425; People's Bank v. Kurtz, 99 Pa. St. 344; Willis v. Philadelphia &c. R. Co., 6 Week. N. Cas. 411; Bruff v. Mali, 36 N. Y. 200; Western &c. R. Co. v. Franklin Bank, 60 Md. 36; Tome v. Parkersburg &c. R. Co., 39 Md. 36; Titus v. Great Western Turnpike Co., 61 N. Y. 237; Pollock on Contracts, § 94. But the contrary doctrine receives the sanction of Redfield on Railways and Field on Corporations, § 144; following Mechanics' Bank v. New York &c. R. Co., 13 N. Y. 599. And in a case where the president of a railway company fraudulently issued certificates of stock, properly signed

and sealed, in excess of the amount authorized by law, it was held, that the stock should be treated as genuine in the hands of *bona fide* holders. Willis v. Fry, 13 Phila. 33.

¹ New York &c. R. Co. v. Schuyler, (1865) 34 N. Y. 30, 50.

² New York &c. R. Co. v. Schuyler, (1865) 34 N. Y. 30, quoting Bank of Kentucky v. Schuylkill Bank, 1 Parson's Sel. Eq. Cas. 180; Bruff v. Mali, 36 N. Y. 206; Titus v. Great Western Turnpike, 61 N. Y. 280; s. c. 5 Lans. 250.

³ Holbrook v. Fauquier &c. Co., 3 Cranch C. C. 425; Grangers' &c. Co. v. Kamper, 73 Ala. 341.

⁴ Bruff v. Mali, 36 N. Y. 205; Phelps v. Wait, 30 N. Y. 78.

⁵ Bruff v. Mali, 36 N. Y. 205; Suydam v. Moore, 8 Barb. 358.

⁶ Sewell's Case, L. R. 3 Ch. App. 131; New York &c. R. Co. v. Schuyler, (1866) 34 N. Y. 56.

stock in excess of the capital limited, but afterwards, by regular legislative authority, raised the capital a larger amount, and recognized the former issue as part of the latter, the illegality of the first issue was cured.¹ But an overissue of stock by a company incorporated by two States, can not be cured except by the legislative sanction of both of the States from which it derives its existence.² An increase in the capital stock, although not made with the formalities required by a State statute, is binding upon the stockholders and the corporation, if made with the consent of all the stockholders.³ And long-continued acquiescence on the part of the stockholders will bar any remedy they may have with respect to the increase.⁴ For assent to irregularly issued stock may be shown as conclusively by acquiescence as by a formal vote.⁵ Where all the stockholders of a corporation assent to the action of a stockholders' meeting in increasing the capital stock, or ratify that action, they can not afterwards object to the increase that no formal notice of the meeting was given.⁶ But the contrary has been held, on the ground that public notice of the increase was a formality in which the public was interested and could not be waived by stockholders.⁷

§ 491. Fraudulently overissued stock invalid.— A corporation with a fixed capital divided into a fixed number of shares, can have no power of its own volition or by any acts of its officers and agents to enlarge its capital or increase the number of shares into which it is divided. The supreme legislative power of the State can alone confer that authority and remove or consent to the removal of restrictions which are part of the fundamental law of the corporate being, and hence every attempt of the corporation to exert such a power

¹ Sewell's Case, (1868) L. R. 3 Ch. App. 181.

² Fisk v. Rock Island &c. R. Co., 53 Barb. 513; O'Brien v. Rock Island R. Co., 53 Barb. 568.

³ Poole v. West Point &c. Assoc., (1887) 30 Fed. Rep. 513.

⁴ Taylor v. South &c. R. Co., 4 Woods, 575. In this case the acquiescence was for ten years.

⁵ Payson v. Stoeber, 2 Dill. 428; Lawe's Case, 1 De G. J. & S. 504.

⁶ Or that it was held in another State than that in which the corporation was chartered, there being nothing in the charter to prohibit its being so held. Stutz v. Handley, (1890) 41 Fed. Rep. 531; s. c. 7 Ry. & Corp. L. J. 407.

⁷ State v. McGrath, (1885) 86 Mo. 239.

before it is conferred by any direct or express action of its officers is void, and hence every indirect and fraudulent attempt to do is void.¹ So that spurious stock fraudulently issued is "utterly invalid," even in the hands of *bona fide* purchasers,² whether the issue has been directed by the corporation itself, or whether it has been made by agents without its authority.³ The corporation itself,⁴ or the stockholders in their own behalf, may file a bill to have the spurious stock cancelled,⁵ and the transfer of overissued stock, or the voting of its holders at corporate meetings, or the payment of dividends upon it, may be restrained by injunction.⁶

§ 492. Personal liability of corporate agents overissuing stock.—Officers of the corporation who knowingly overissue stock, incur personal liability to the shareholder, whether original taker or *bona fide* transferee, for damages in an action for deceit.⁷ The holder of the overissued stock may recover from

¹ New York &c. R. Co. v. Schuyler, 34 N. Y. 30, 49, holding that the company is entitled to have all certificates and transfers which represent such spurious stock declared void and ordered to be cancelled. And in an action on the contract against the company, it will not be estopped from setting up its want of corporate power to issue the spurious certificates. Wood's Ry. Law, § 93, citing Hood v. New York &c. R. Co., 22 Conn. 502.

² Scovill v. Thayer, 105 U. S. 143; Bruff v. Mali, 36 N. Y. 200; New York &c. R. Co. v. Schuyler, 34 N. Y. 30, 49; People v. Parker &c. Co., 10 How. Pr. 543; Wright's Appeal, 99 Pa. St. 425; People's Bank v. Kurtz, 99 Pa. St. 344.

³ Scovill v. Thayer, 105 U. S. 143; Railway Co. v. Allerton, 18 Wall. 233; New York &c. R. Co. v. Schuyler, 34 N. Y. 30; Mechanics' Bank v. New York &c. R. Co., 13 N. Y. 599; New York &c. R. Co. v. Ketchum, 3 Keyes, 363 (the last three cases

frauds); Stace's Case, L. R. 4 Ch. 688, note.

⁴ Plimpton v. Bigelow, 93 N. Y. 592, 602; Venice v. Woodruff, 62 N. Y. 462; New York &c. R. Co. v. Schuyler, 17 N. Y. 592; s. c. 34 N. Y. 30; Lehigh Valley R. Co. v. McFarland, 31 N. J. Eq. 730.

⁵ Dewing v. Perdicaries, 96 U. S. 193; Wood v. Union &c. Assoc., 63 Wis. 9.

⁶ Thomas v. The Railroad, 101 U. S. 71; Kent v. Quicksilver Mining Co., 78 N. Y. 139; Sherman v. Clark, 4 Nev. 138.

⁷ Fairbanks v. Humphreys, 18 Q. B. Div. 54; Shotwell v. Mali, 38 Barb. 445; Beach on Railways, § 276; Bruff v. Mali, 36 N. Y. 200; Cazeau v. Mali, 25 Barb. 578; National Exchange Bank v. Sibley, 71 Ga. 726; Whitehaven &c. Co. v. Reed, 54 L. T. Rep. 360. The New York Penal Code, § 518, provides that an officer, agent or other person employed by any corporation, who wilfully and with design to defraud sells, pledges or issues or causes to be sold, pledged

the officer in an action against him, either jointly with the company or separately.¹ The injured party can sue the directors in a separate action for deceit, if they knowingly pledge over-issued stock.²

§ 493. **The measure of damages for overissuing stock.**—In actions by a *bona fide* purchaser against a company that refuses to transfer or redeem shares of stock fraudulently over-issued, the measure of damages is the market value of the shares at the time the corporation refused to transfer or redeem them;³ or if no demand were made, at the date of filing the bill, subject to such lien as would properly have attached to genuine stock under similar conditions.⁴ And the same measure is applied in an action against the vendor.⁵ But a somewhat different rule was announced in a leading case, where, in an action against a corporation growing out of an overissue of stock, the measure of damages was considered to be the amount which the plaintiff paid for the stock together with interest thereon, if the jury deem it proper to allow interest.⁶

or issued, or for those purposes signs or procures to be signed a false instrument purporting to be a scrip, certificate or other evidence of the ownership or transfer of any share in the company, or bond or other evidence of debt of the company, is guilty of forgery in the third degree and may be punished not only with the usual penalties for that offence, but also by a fine not exceeding three thousand dollars.

¹ *Bruff v. Mali*, 36 N. Y. 205; *Phelps v. Wait*, 30 N. Y. 78; *Suydam v. Moore*, 8 Barb. 358.

² *National Exchange Bank v. Sibley*, 71 Ga. 726; *Ashbury v. Watson*, 54 L. T. 30; *Bruff v. Mali*, 36 N. Y. 200; *Cazeau v. Mali*, 25 Barb. 578.

³ *Allen v. South Boston R. Co.*, (1889) 150 Mass. 207; *In re Bahia & C. Ry. Co.*, L. R. 3 Q. B. 584. This would be the rule of damages if the certificates were valid. *Allen v.*

South Boston R. Co., (1889) 150 Mass. 207; *Sargent v. Franklin Ins. Co.*, 8 Pick. 90; *Wyman v. American Powder Co.*, 8 Cush. 168.

⁴ *In re Bahia & C. R. Co.*, L. R. 3 Q. B. 595; *Philadelphia & C. R. Co. Cases*, 13 Phila. 44; s. c. 99 Pa. St. 344, 513.

⁵ *People's Bank v. Kurtz*, 99 Pa. St. 344, 349.

⁶ *Tome v. Parkersburg Branch R. Co.*, 39 Md. 36, 87. And in this case it was further said that the depreciation of the value of the stock in the market at the time the money was paid, is not to be taken into consideration; nor if the value of the stock should exceed the amount paid therefor with interest, can the plaintiff recover in any event more than that sum with interest. *Cf. Fairbanks v. Humphreys*, 18 Q. B. Div. 54, from which it seems that in an action against the directors for

§ 494. **Liability of holders of overissued stock — (a) In general.**— An attempt to increase the stock of a company beyond the limit fixed by its charter is *ultra vires*. The stock itself is therefore void. It confers on the holder no rights, and subjects him to no liability.¹ Accordingly a stockholder who agreed to take new stock of the company that was issued in excess of the amount by which the capital might be increased by law, is not estopped to set up the invalidity of the issue upon suit brought upon his contract to pay for it,² neither by having attended by proxy the meetings at which it was voted to issue it, nor by having received certificates for the stock thus voted for, nor by the fact that after the unauthorized issue the company by its agents held itself out as possessing a capital equal to the amount represented both by its genuine and its spurious certificates and obtained credit on the faith of these representations.³ So of course the mere

an overissue of stock the measure of damages would be the value of the stock, less, possibly, the amount which the allottees can recover from the company.

¹ *Scovill v. Thayer*, (1881) 105 U. S. 143; *Grangers' &c. Co. v. Kamper*, 73 Ala. 325.

² *Scovill v. Thayer*, (1881) 105 U. S. 143; *Knowlton v. Congress &c. Co.*, 103 U. S. 49; s. c. 14 Blatchf. 364; *Thomas v. City of Richmond*, 12 Wall. 349, 355; *Nellis v. Clarke*, 4 Hill, (N. Y.) 424; *Morgan v. Groff*, 4 Barb. 524; *Reed v. Boston Machine Co.*, 141 Mass. 454; *White v. Franklin Bank*, 22 Pick. 181; *Clark v. Turner*, 73 Ga. 1; *Lawry v. Bourdieu*, Dougl. 468; *Bone v. Ekless*, 5 Hurl. & N. 925; *Hastelow v. Jackson*, 8 Barn. & C. 221; *Walker v. Chapman*, Lofft. 342; *Tappenden v. Randall*, 2 Bos. & P. 467; *Aubert v. Walsh*, 4 Taunt. 293; *Busk v. Walsh*, 4 Taunt. 290.

³ *Scovill v. Thayer*, (1881) 105 U. S. 143, where the court said that the public is bound to know that the law permitted no such increase of

the capital stock as the company had attempted to make, and that any representation that it had been made was false. See, also, *Zabriskie v. Cleveland &c. R. Co.*, 23 How. 381. Cf. *Smith v. Co-Operative Dress Assoc.*, 12 Daly, 304. An act absolutely and wholly void, because under the law incapable of being performed, can not be made valid by estoppel. This is true where under the law there is an entire lack of power to do the act which is brought in question. The distinction is well illustrated in *Scovill v. Thayer*, 105 U. S. 149. Under the law of Kansas, no company like that then before the court could increase its capital to more than double an amount originally authorized. The capital was sought to be increased in excess of that amount. As against creditors, it was claimed to be a valid increase, by the operation of an estoppel, but the court ruled otherwise, on the ground that the very foundation of an estoppel, the misleading of creditors to their injury, was wanting. The latter knew, and were bound to

subscription to irregularly issued stock, without any payment thereon; or other act of recognition, will not be binding, and when a subscriber has done nothing by which he may be held estopped, he may decline to receive stock improperly issued, and may be in a position to defend a suit brought to enforce his subscription to it.¹ He may even recover money paid thereon if it appear that the issue was irregular.² And a note, the consideration whereof is stated therein as being shares of the capital stock, is held to be non-collectible if there has been an overissue of stock; inasmuch as it can not be shown but that the shares delivered to the purchaser were among those illegally issued.³

§ 495. (b) **Estoppel.**— Holders of irregularly increased stock may be liable on account thereof by estoppel.⁴ In a case where the meeting at which the stock was increased was not formally called, nor the certificate of the increase of capital made and filed as prescribed by statute, where the stock was all issued to stockholders who had voted for the increase, and who subsequently received dividends thereon, the court held them estopped. For here the abstract power did exist and there was a way in which the increase could lawfully be made, and the creditors could without fault believe that this increase had been lawfully effected. The necessary steps had been taken, and the doctrine of estoppel was held to apply and

know, that no power existed to so increase the capital, and therefore that it was not increased; and hence they were not and could not be misled. "But where, as in the present case, the abstract power did exist, and there was a way in which the increase could lawfully be made, and the creditors could, without fault, believe that the increase had been lawfully effected, and the necessary steps had been taken, then the doctrine of estoppel may apply, and the increased stock be deemed valid as to creditors." *Stutz v. Handley*, (1890) 41 Fed. Rep. 531; s. c. 7 Ry. & Corp. L. J. 407, citing *Scovill v. Thayer*, 105 U. S. 143.

¹ *Kansas City Hotel v. Hunt*, 57 Mo. 126; *Sturges v. Stetson*, (1858) 1 Biss. 246.

² *Spring Company v. Knowlton*, 103 U. S. 49, affirming s. c. *sub nom.* *Knowlton v. Congress &c. Co.*, 14 Blatchf. 364; *Peckham v. Smith*, 9 How. Pr. 435.

³ *Merrill v. Beaver*, 50 Iowa, 404; s. c. 46 Iowa, 646; *Merrill v. Gamble*, 46 Iowa, 615; *Beach on Railways*, § 277.

⁴ *Pool v. West &c. Assoc.*, (1887) 30 Fed. Rep. 513; *Kent v. Quicksilver Co.*, 78 N. Y. 180; *Kansas City Hotel v. Harris*, 51 Mo. 464; *Clark v. Thomas*, 34 Ohio St. 46.

the increased stock was deemed valid as to the creditors who had acted upon the faith of an increase so effected.¹ Where a defendant subscribed for new stock in a bank, and received a certificate on the basis of a total subscription of one amount, and the actual increase was somewhat smaller, and he protested, and refused to vote on the stock, but retained his certificate until the bank went into the hands of a receiver, several months later, it was held that he was liable on his subscription, and that it was too late to claim that the increase as to him was invalid.² The highest of our courts has given an extended and authoritative *resumé* of the law upon the subject, saying: "It is settled by the decisions of the federal courts and by the decisions of many of the State courts, that one who contracts with an acting corporation can not defend himself against a claim on such contract, in a suit by the corporation, by alleging the irregularity of its organization. The same principle applies to the case of a subscription to the capital stock in an organization which has attempted irregularly to create itself into a corporation and has acted as such. The rule applies to increasing the stock of the corporation, when the question arises upon paying a subscription for stock forming a part of such increase. The duty and necessity of performing the contract of subscription are the same as in the case of an original stockholder."³

¹ *Veeder v. Mudgett*, 95 N. Y. 310; *Shelton v. Eickenmeyer*, 90 N. Y. 613; *Kent v. Quicksilver &c. Co.*, 78 N. Y. 159; *Buffalo &c. R. Co. v. Cary*, 26 N. Y. 75; *Aspinwall v. Sacchi*, 51 N. Y. 331; *Eaton v. Aspinwall*, 19 N. Y. 119.

² *Butler v. Aspinwall*, (1888) 33 Fed. Rep. 217.

³ "The statute authorized an increase of the capital stock, papers were filed under the law for that purpose, which were examined by the Attorney General and certified to in due form, and the company proceeded to issue its stock upon that theory. The defendant became a subscriber and attended meetings. It is idle to deny that this was a

case of organization which claimed to have taken, and evidently supposed it had taken, the measures required by law to complete its increase of capital. It acted as such, and the defendant, by receiving his certificate of stock, entered into engagements as such. If it be conceded that its increased stock be but *de facto*, and that it could have been annulled or suppressed by the action of the Attorney-General as acting under an irregular organization, the defendant derives no aid from the admission. The cases are clear to the point that he can not make the objection, but must perform the engagements he has made." *Chubb v. Upton*, 95 U. S. 667.

§ 496. (c) **Knowledge of the creditor.**—Where, upon the purchase of additional property, the capital of a corporation is increased by the issue to the stockholders, upon the surrender of their old certificates, of new stock to a much greater extent than the cost or value of the additional property, the stockholder can not be held individually liable upon the stock issued, at the suit of a creditor who was cognizant of the whole transaction, and acquiesced in it.¹ Where it does not appear that a complainant had any knowledge of, or gave any consent to, the arrangement under which increased stock was distributed to subscribers for bonds and to existing stockholders, the complainant is not required to go further, and show affirmatively that he knew of the stock being increased, and treated or dealt with the corporation upon the faith that it had actually been or would be paid. If the increase of the stock is made public, those thereafter dealing with the company will be presumed to have done so in reliance upon the new stock as a part of the corporate capital pledged for their security.² The public has the right to believe that each holder

¹ *Coit v. North Carolina Gold & Co.*, (1887) 119 U. S. 343, affirming *s. c. sub nom. Coit v. Amalgamation Co.*, 14 Fed. Rep. 12. In that case there was a new issue of stock, connected with the acquisition by the corporation of certain real estate, the title to which failing, or proving defective, the new stock was thereupon called in and canceled, and the transaction rescinded. The creditors, who after the cancellation of the transaction and this new stock sought to compel parties to whom portions of it were issued to pay it, knew of and acquiesced in the whole transaction. Mr. Justice Bradley said, in deciding the case on the circuit, that "if a legal presumption did not arise that Mr. Coit (the creditor) knew of the transaction at that time, and there was no proof that he knew of it, it would present a different case." The claim originated before the temporary increase of the

stock, and the Supreme Court, in passing upon the case, (119 U. S. 347) say: "Had a new indebtedness been created by the company after the issue of the stock, and before its recall, a different question would have arisen." In the subsequent case of *Bank v. Alden*, 129 U. S. 372, the Supreme Court again held that a creditor of a corporation, who had knowledge of and assented to a transaction between the corporation and a stockholder at the time when it took place, could have no resort against such stockholder.

² *Haldeman v. Ainslie*, 82 Ky. 395; *Pullman v. Upton*, 96 U. S. 331; and *Adderley v. Storm*, 6 Hill. 629. In this last case it is said: "It seems to have been thought a matter of some moment that the plaintiff, so far as appeared on the trial, had not examined the stock ledger before he gave credit to the company. But there are other ways in which he

of the increased stock has either paid for his share or is liable for the amount; and a creditor who trusts the corporation upon the faith of its ability to pay, and without any knowledge of the contract or arrangement between the stockholders and the company under which the stock is treated as paid up, may compel shareholders to make actual payment.¹ And aside from any provision of the statute, which is nothing more than the legislative recognition of the general principle enforced by courts of equity, it is well settled by the authorities that old stockholders who accept and hold portions of increased stock, can not claim exemption from liability thereon, as against creditors, especially those who have dealt with the company in ignorance of the arrangement that such stock was treated and received as fully paid up, when such was not the fact.² The burden of showing any such express representation that the new shares had actually been issued, as a condition to his right to compel stockholders to pay up their unpaid shares, is not imposed upon creditors.³ After the insolvency of the corporation, it will not avail holders of

may have learned that the defendants were stockholders, and, besides, I do not see that the liability of the stockholder has been made to depend on the fact that the creditor knew he could be reached. . . . As the defendants were in fact stockholders, they must answer to the plaintiff, although he may not have known at the time he trusted the company that the defendants could be reached."

¹ *Haldeman v. Ainslie*, 82 Ky. 395; *Stutz v. Handley*, (1890) 41 Fed. Rep. 332; s. c. 7 Ry. & Corp. L. J. 407.

² *Stutz v. Handley*, (1890) 41 Fed. Rep. 332; s. c. 7 Ry. & Corp. L. J. 407.

³ *Stutz v. Handley*, (1890) 41 Fed. Rep. 331; s. c. 7 Ry. & Corp. L. J. 407. The court in this case says the statement in section 833 of *Morawetz on Private Corporations*, that subsequent creditors would have an equitable claim to have new shares paid up in full, "if it was expressly

represented to the creditors that the new shares had actually been issued," is hardly warranted by the authorities. It being settled by the authorities referred to that the coal company could not lawfully give or distribute to defendants paid-up shares of its increased stock as a bonus to go with its bonds subscribed for by them, and it being further settled that the acceptance and holding of certificates for such shares of stock is, in effect, the same as a promise to take shares, which imports a promise to pay for them whenever the liability of the company required it, (102 U. S. 316) or as expressed by Mr. Justice Bradley in *Coit v. Amalgamation Co.*, 14 Fed. Rep. 18, "that stock issued to a party which he receives is the same as though he had subscribed for it," the conclusion is inevitable that the defendants are severally liable for the unpaid shares of capital stock

the shares that they were induced by mistake or fraud to accept and receive the stock in question, nor can they after the rights of creditors have attached, disclaim its ownership, so as to escape liability. Even before suit commenced, the corporation could not have released them, so far as creditors were concerned.¹

received and held by them so far as 841; Taylor Corp. § 744; Upton v. Tribilcock, 91 U. S. 47, 48, 50, 54, 55, and cases cited.

may be necessary to satisfy the corporate debt.

¹ 2 Morawetz Priv. Corp. §§ 840,

CHAPTER XXV.

PREFERRED STOCK.

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| <p>§ 497. Introductory.</p> <p>498. Statutory authority.</p> <p>499. Validity of preferred stock.</p> <p>500. Acquiescence in issue.</p> <p>501. Preferred dividends—(a) In general.</p> <p>502. (b) Payable only out of net profits.</p> <p>503. (c) Arrears.</p> <p>504. (d) Enforcement of payment.</p> | <p>§ 505. Status of preferred shareholders.</p> <p>506. Preferred stock deferred to debts.</p> <p>507. Right of preference stockholders in distribution of capital.</p> <p>508. Exchanging common for preferred stock.</p> <p>509. Special stock.</p> |
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§ 497. **Introductory.**—Preferred shares are those the owners of which are entitled to profits to a certain extent in preference to other shareholders. They differ from other shares only in being entitled, as against them, to payment of dividends in priority to them.¹ They are indifferently called preferred, preference, preferential or guarantied shares.² Preferred stock partakes of the nature of what may be called interest-bearing stock, or ordinary common stock upon which the company has promised to pay interest. This interest, however, in so far as it differs from an ordinary dividend, is a preference dividend and subject to the law governing preferred stock.³ This kind of stock is usually issued by companies

¹ "Preferred Stock," by John D. Lawson, (1881) 20 Am. L. Reg. 633; *Totten v. Tison*, 54 Ga. 139; *Chaffee v. Rutland &c. R. Co.*, (1882) 55 Vt. 110; *Henry v. Great Northern Ry. Co.*, 4 Kay & J. 1.

² *Henry v. Great Northern R. Co.*, 4 K. & J. 1.

³ *Painesville &c. R. Co. v. King*, 17 Ohio St. 534; *Pittsburgh &c. R. Co. v. County of Allegheny*, 63 Pa. St. 126; *Troy &c. R. Co. v. Tibbits*, (1884) 18 Barb. 297; *Miller v. Pittsburgh &c. R. Co.*, 40 Pa. St. 237; s. c. 80 Am. Dec. 570; *Lockhart v. Van Alstyne*, (1875) 31 Mich. 76; *Barnard v. Vermont &c. R. Co.*, 89 Mass. 512; *Waterman v. Troy &c. R. Co.*, 74 Mass. 433; *Wright v. Vermont &c. R. Co.*, 66 Mass. 68; *Cunningham v. Cunningham*, 78 Mass. 411; *Richardson v. Vermont &c. R. Co.*, 44 Vt. 613; *Rutland R. Co. v. Thrall*, 35 Vt. 543; *McLaughlin v. Detroit &c. R. Co.*, 8 Mich. 100; *Evansville &c. R. Co. v. City of Evansville*, 15 Ind. 395; *City of Ohio v. Cleveland &c. R. Co.*, 6 Ohio St. 489; *In*

which have expended their original capital, for the purpose of obtaining further capital, and therefore when the authority to issue it is given, it is necessary that it should be employed for that purpose alone, and the company can not pay dividends with such stock.¹ Accordingly the issue of preferred stock can not be justified except for the purpose of strengthening the company's standing or enlarging its business. When the corporation has reached a crisis in its affairs, and the shareholders are unable or unwilling to sink any more money in the enterprise, but yet are ready to give those who will do so a preference as to any profits which the increased means may enable the concern to make, the transaction is fair and equitable.² Preferred shareholders have the same voice in the control of the company, as a general rule, as the other stockholders, together with the right to vote at any meeting of the holders of the capital stock. But to this rule there may be exceptions; and it is competent for a company, in issuing certificates of preferred stock, to stipulate therein that the holders shall not have or exercise the right to vote upon it, at any meeting of the stockholders of the company.³

re National &c. Co., 10 Ch. Div. 118; *Salisbury v. Metropolitan Ry. Co.*, 38 L. J. Ch. N. S. 249. *Cf. Bardwell v. Sheffield &c. Co.*, L. R. 14 Eq. Cas. 517.

¹ *Hoole v. Great Western R. Co.*, L. R. 3 Ch. 262.

² *Lockhart v. Van Alstyne*, 31 Mich. 76.

³ *Miller v. Ratterman*, (Ohio, 1890) 8 Ry. & Corp. L. J. 69. The court here said: "The provision is not unusual. It is sometimes found in the statute itself. Nor is it unreasonable. The promise to the preferred stockholders was to award them the first net earnings—the holders of the common stock to share in such of the net earnings as they might, by good management, be able to make over and above the eight per cent. As the burden was upon the common stockholders, the power to

manage might fairly be left with them. In any view, it is fair to treat the proviso as but an arrangement between two classes of stockholders which did not concern the public.

It is true that one characteristic of stock, generally is that it can be voted upon. But this is not essential. Indeed, instances may arise where it is good policy to prohibit the voting upon stock. *Ryan v. Railway*, 10 Am. Law Rec. 263; *Ex parte Holmes*, 5 Cow. 426; *Railway Frog Co. v. Haven*, 101 Mass. 398; *State v. Hunton*, 28 Vt. 594. And the point here is, not whether any question of public policy intervenes to make it improper for the preferred stockholders to possess a right to vote, but whether any question intervenes to make it imperative that they shall have that right."

§ 498. **Statutory authority.**—Preference stock is frequently authorized by statute, charter or articles of the corporation.¹ And the general rule is that the power to issue preferred or guarantied stock exists only when conferred by statute or by charter.² The creation of preferred stock may be authorized by an alteration in the charter of the corporation or by other subsequent act of legislation, as well as by the original charter or act.³ And such legislation is not unconstitutional.⁴ The power need not be granted in express words. Thus under an act which provides that where a company is unable to meet its engagements, the directors may prepare a scheme or arrangement with their creditors which must be assented to by three-fourths of the mortgagees, holders of debenture stock and other obligations and confirmed by the court of chancery, many schemes involving the issue of preferred stock have been adopted.⁵ And under an act authorizing a corporation to increase its capital stock in such manner as it may deem advisable, or to such extent as might be deemed advisable to borrow money at a rate of interest not exceeding seven per cent. and to issue proper certificates convertible into stock at the pleasure of the holder, it was held that the corporation was authorized to issue seven per cent. guarantied stock.⁶ So also it has been decided that under a power to increase the capital stock, the corporation by a majority vote may issue preferred stock, the privilege of

¹ *St. John v. Erie R. Co.*, (1874) 22 Wall. 136; *s. c.* 10 Blatchf. 271; *Davis v. Proprietors*, 8 Metc. 321; *Taft v. Hartford &c. R. Co.*, (1866) 8 R. I. 310; *In re Anglo-Danubian &c. Co.*, L. R. 20 Eq. 339; *Henry v. Great Northern R. Co.*, 1 De G. & J. 606; *Matthews v. Great Northern &c. R. Co.*, 28 L. J. Ch. 375.

² *Taylor v. South &c. R. Co.*, 4 Woods, 575; *Sturge v. Eastern &c. R. Co.*, 7 De Gex, M. & G. 158.

³ *Kent v. Quicksilver Min. Co.*, (1879) 78 N. Y. 159; *Rutland &c. R. Co. v. Thrall*, 35 Vt. 537; *Covington v. Covington &c. Co.*, (1873) 10 Bush, 69.

⁴ *Covington v. Covington &c. Co.*, (1873) 10 Bush, 69.

⁵ *Railway Clauses Act 1867*, 30 & 31 Vict. ch. 127, §§ 6-17; *Matthews v. Great Northern Ry. Co.*, 28 L. J. Ch. 375; *Webb v. Earle*, L. R. 20 Eq. 556; *Corry v. Londonderry &c. R. Co.*, 29 Beav. 268; *Stevens v. Midhants R. Co.*, L. R. 8 Ch. 448; *In re Devon &c. R. Co.*, L. R. 8 Ch. 610; *London &c. Assoc. v. Wrexham &c. R. Co.*, L. R. 18 Eq. 566; *Munnsv. Isle of Wight R. Co.*, L. R. 8 Eq. 655; *In re East &c. R. Co.*, L. R. 8 Eq. 87; *In re Potteries &c. R. Co.*, L. R. 3 Ch. 67; *In re Cambrian R. Co.*, L. R. 3 Ch. 278.

⁶ *Gordon v. Richmond &c. R. Co.*, (1884) 78 Va. 501.

so doing being founded upon the power of corporations to borrow money.¹ And again the power to issue preferred stock, when not expressly conferred, may even be implied from the terms used in the articles of association of a corporation. As where the articles of association provided that the directors might, with the sanction of a special resolution of the company, given at a general meeting, increase the capital by the issue of new shares, the increase of capital to be made in such manner, to such amount and to be subject to such rules, regulations, privileges and conditions as the company in general meeting should think fit.²

§ 499. **Validity of preferred stock.**—The validity of preferred stock has been sustained upon principle in many American cases.³ The issue of preferred stock has been considered

¹ Rutland &c. R. Co. v. Thrall, 35 Vt. 536; Harrison v. Mexican &c. R. Co., L. R. 19 Eq. Cas. 358.

² Harrison v. Mexican Ry. Co., L. R. 19 Eq. 358. The court said in this case: "The capital is to be raised or to be increased in such manner, and with and subject to such rules, regulations, privileges and conditions as the company think fit. . . . I think there is no limit to the privilege that may be attached to the shares by the general meeting, as far as regards participation in dividends, or any other right whatever." While, however, the power to issue preferred stock need not be given in express words, it is not to be lightly inferred from the language of charters and statutes. Moss v. Syres, 32 L. J. Ch. 711.

³ Hazlehurst v. Savannah &c. R. Co., 43 Ga. 15; Totten v. Tison, (1875) 54 Ga. 139; Rutland &c. R. Co. v. Thrall, (1863) 35 Vt. 537; Richardson v. Vermont &c. R. Co., 44 Vt. 613; Prouty v. Michigan &c. R. Co., (1874) 1 Hun, 655; West Chester &c. R. Co. v. Jackson, (1875) 77 Pa. St. 321; Bates v. Androscoggin &c. R. Co., (1862) 49 Me. 497; Wright v. Ver-

mont &c. R. Co., (1853) 12 Cush. 68; Waterman v. Troy &c. R. Co., 18 Gray, 433; Cunningham v. Vermont &c. R. Co., 12 Gray, 411; Barnard v. Vermont &c. R. Co., (1863) 7 Allen, 512; Evansville R. Co. v. Evansville, 15 Ind. 395; Lockhart v. Van Alstyne, (1875) 31 Mich. 81; McLaughlin v. Detroit &c. R. Co., 8 Mich. 100; Covington v. Covington &c. Co., 10 Bush, 69. It has been said in the leading case upon the subject: "We are not prepared to say that at the first the corporation might not have lawfully divided the interest in its capital stock into shares arranged into classes, preferring one class to another. The charter gave power to make such by-laws as it might deem proper, consistent with constitution and law; and to issue certificates of stock representing the value of the property. We know nothing in the constitution or the law that inhibits a corporation from beginning its corporate action by classifying the shares in its capital stock, with peculiar privileges to one share over another, and thus offering its stock to the public for subscription thereto."

as partaking of the nature of a loan and therefore not *ultra vires*, where there was a condition for payment of interest until the company should go into operation;¹ where there was a provision for the redemption of the stock;² where the preferred stock was surrendered and a bond and mortgage taken in its stead, the preferential shareholders thereafter not being entered as members of the corporation;³ and where such stock was secured by bond and mortgage, the holders being expressly prohibited by statute from becoming members of the corporation.⁴ The argument used in favor of the right to create preferred stock, is that a corporation has power to borrow money and give security therefor, and that the issuing of preferred stock is merely one way of pledging the assets of the company for that purpose, and hence justifiable. The answer given to this is that the transaction is not a loan and borrowing, because it does not create a debt which can be redeemed, but the holders of preferred stock have a perpetual lien upon the corporate profits.⁵ The argument against the power is simply that by taking shares in a corporation with a fixed capital divided into a specified number of shares, one becomes the owner of a certain interest in the enterprise, measured by the proportion which the amount of his shares bears to the whole capital. This entitles him to a corresponding proportion of the profits, and he can not afterwards be deprived of that fixed proportion on any pretense without a violation of the original contract.⁶ Thus a majority of the shareholders of a company, in order to induce persons to take some of the stock unsold, can not authorize the directors to

No rights are got until a subscription is made. Each subscriber would know for what class of stock he put his name, and what right he got when he thus became a stockholder. There need be no deception or mistake; there would be no trenching upon rights previously acquired; no contract, express or implied, would be broken or impaired." Folger, J., in *Kent v. Quicksilver Min. Co.*, (1879) 78 N. Y. 177.

¹ *Richardson v. Vermont &c. R. Co.*, 44 Vt. 613.

² *West Chester &c. R. Co. v. Jackson*, (1875) 77 Pa. St. 321.

³ *Totten v. Tison*, (1875) 54 Ga. 139.

⁴ *Burt v. Rattle*, (1877) 31 Ohio St. 116. And see *Rutland &c. R. Co. v. Thrall*, (1863) 35 Vt. 536; *Hazlehurst v. Savannah &c. R. Co.*, 43 Ga. 13.

⁵ *Per Folger, J.; obiter*, in *Kent v. Quicksilver Min. Co.*, (1879) 78 N. Y. 177.

⁶ "Preferred Stock," Editorial Article, (1882) 16 Am. L. Rev. 460.

make an arrangement for giving to them a preferential dividend.¹ This assumes that there is at the outset a fixed capital, and also that there is no power granted to create preferred stock. When the special charter, or the general law of a corporation organized under a general law, gives that power, there is no room for the objection that the original contract has been violated. The law in that case is the contract, and the shareholder expects to be bound by anything contained therein.²

§ 500. Acquiescence in issue.—The right to create a preferred stock is merely a question of contract, and if all agree to a modification of the original agreement it is legalized.³ Thus, while a corporation already organized can not, after issuing common stock, create preferred stock, except by virtue of authority conferred by its charter or by-laws, it may nevertheless do so with the consent of all the shareholders whose rights would be affected thereby.⁴ And by their acquiescence the shareholders are estopped to deny the validity of the issue.⁵ Especially where third persons have dealt in the preferred stock of the company, relying in good faith upon the existence of corporate authority to issue it, is it unnecessary that there should have been an express assent thereto on the part of the stockholders to work an equitable estoppel upon them.⁶ Mere negative conduct is sufficient to create an estoppel,

¹ *Hutton v. Scarborough &c. Co.*, 2 Dr. & Sm. 514; s. c. 4 De G. J. & S. 672. *Hazlehurst v. Savannah &c. R. Co.*, 43 Ga. 13, conflicts with this case, but was not a well considered opinion.

² "Preferred Stock," (1882) 16 Am. L. Rev. 461, citing *Prouty v. Michigan &c. R. Co.*, (1874) 1 Hun, 655; *West Chester &c. R. Co. v. Jackson*, (1875) 77 Pa. St. 321.

³ "Preferred Stock," Editorial Article, (1882) 16 Am. L. Rev. 160; *Lockhart v. Van Alstyne*, (1875) 31 Mich. 81.

⁴ *Kent v. Quicksilver Min. Co.*, (1879) 78 N. Y. 159, where the court said: "It was not expressly prohib-

ited by the charter, nor by any statute, to this corporation to classify the shares of its capital stock, so that one class should have greater right and value than another. It was not *malum in se* so to do unless it was that a vested right was thereby affected; but that was not a public evil; it was a wrong that affected private persons only and one which they might assent to."

⁵ *Taylor v. South &c. R. Co.*, 4 Woods, 575; *Hazlehurst v. Savannah &c. R. Co.*, 43 Ga. 13. See, also, *Branch v. Jesup*, 106 U. S. 468.

⁶ *Kent v. Quicksilver Min. Co.*, (1879) 78 N. Y. 159.

where to hold the issue invalid would be detrimental to third parties.¹ Accordingly, where a corporation by a new by-law created and issued preferred stock, the common stockholders, having for four years, with full knowledge of the issue of such stock and of the fact that the two kinds of stock were dealt in at different places, acquiesced in the corporate action, were held to be estopped by acquiescence and delay from claiming that the preferred stock was not entitled to all the privileges intended to be conferred upon it.² And though ordinarily the power of the corporation to issue preferred stock can be exercised only by the shareholders, yet if the directors, without previous authority from the shareholders, issue it, their act may be validated by a subsequent ratification by the shareholders.³ The purchaser of preferred stock may himself be estopped to deny its validity. Thus where he purchased such stock, issued without statutory authority, was active in passing the resolution authorizing its issue, voluntarily subscribed and paid for it, held it for many months, voted upon it, and used it to obtain control of the corporation's affairs upon the insolvency of the corporation, he can not assert its invalidity and recover the money he paid for it.⁴

¹ *Kent v. Quicksilver Min. Co.*, (1879) 78 N. Y. 159.

² *Kent v. Quicksilver Min. Co.*, (1879) 78 N. Y. 159. The court here said: "We suppose acquiescence or tacit assent means the neglect to promptly and actively condemn the unauthorized act, and to seek judicial redress, after knowledge of the committal of it, whereby innocent third parties have been led to put themselves in a position from which they can not be taken without loss."

³ *McLoughlin v. Detroit & C. R. Co.*, 8 Mich. 100.

⁴ *Banigan v. Bard*, (1889) 30 Fed. Rep. 13; s. c. 6 Ry. & Corp. L. J. 170; s. c. affirmed, (1890) 134 U. S. 291; s. c. 8 Ry. & Corp. L. J. 14. The court below, in this case, said: "For the purposes of this case I shall assume that the unanimous consent of all the stockholders not having

been affirmatively expressed by vote or by equivalent act, the preferred stock was invalid. If so, the acquiescence of the stockholder can not give it validity, and he is not estopped from asserting that it is invalid. *Scovill v. Thayer*, 105 U. S. 143. If a stockholder could be estopped, *Banigan* would necessarily be, because he was one of the promoters of the scheme, urged his co-stockholders to buy, voted upon it, and for the purpose of favorably explaining the company's position to the firm which was to take and negotiate its paper, asserted that it could issue preferred stock, and had done so, to the amount of \$25,000. Notwithstanding the Massachusetts authorities to the contrary (*Tube Works v. Machine Co.*, 139 Mass. 5; *Reed v. Machine Co.*, 141 Mass. 454), I am not favorably impressed with the

§ 501. Preferred dividends — (a) In general.— The holder of preferred stock is entitled to a preferred dividend, which is payable to that class of shareholders in priority to dividends payable to holders of deferred stock.¹ A dividend, when spoken of in reference to a going concern, means a fund which the corporation sets apart from its profits to be divided among its members. A dividend among preference stockholders is understood to imply that the sum divided has been realized as profits, though the earnings do not yield a dividend to the stockholders in general.² The preferred stockholders therefore have a pledge of the funds legally applicable to the purposes of a dividend.³ But as to any excess of dividends to which preferred stock may be entitled beyond the guaranteed per cent., it must stand on the same footing with the common stock.⁴ Thus where the certificate of preferred stock provides, that after the payment of the guaranteed percentage, the preferred stockholders shall share in any surplus beyond a certain percentage, which may be divided upon the common stock, the preference shareholders are, after receiving their guaranteed percentage, to be deferred until the common shareholders have received their specified percentage; and then all stockholders are to be on the same footing as to any remaining surplus.⁵

§ 502. (b) Payable only out of net profits.— Preferred stock is entitled to dividends only out of the net profits of the enter-

doctrine that as against the assignee or receiver of an insolvent corporation, the owner of preferred stock, who has voluntarily subscribed and paid for it for the purpose of promoting the scheme, and has received his certificate therefor, and the terms and conditions upon which the subscription was made have been fully complied with by the corporation, can not recover the amount paid. In *Winters v. Armstrong*, 37 Fed. Rep. 508, Judge Jackson guards against such a broad principle, and it is not in accordance with the teaching of *Scovill v. Thayer*, 105 U. S. 143."

¹ *Thompson v. Erie R. Co.*, 11 Abb. Pr. N. S. 188; *Belfast &c. R. Co. v. Belfast*, (1887) 77 Me. 445; *Chaffee v. Rutland &c. R. Co.*, (1882) 55 Vt. 110; *Taft v. Hartford &c. R. Co.*, 8 R. I. 310, 333.

² *Cooley, J.*, in *Lockhart v. Van Alstyne*, (1875) 31 Mich. 76; *Taft v. Hartford &c. R. Co.*, 8 R. I. 310.

³ *Taft v. Hartford &c. R. Co.*, 8 R. I. 310, 335.

⁴ *Gordon v. Richmond &c. R. Co.*, (1884) 78 Va. 501; *Harrison v. Mexican Ry. Co.*, L. R. 19 Eq. 358; *Ragland v. Broadnax*, 29 Gratt. 401.

⁵ *Bailey v. Railroad Co.*, (1872) 17 Wall. 96; s. c. 1 Dill. 174.

prise.¹ The dividends thereon are not payable absolutely as interest is, but the preference is limited to profits whenever earned.² The dividends are equivalent to annual or semi-annual payments, and, under the general form of certificate in these cases, depend on no contingency except that the net profits of the association shall be sufficient to pay them.³ They are, therefore, in the nature of "interest chargeable exclusively upon profits."⁴ Even an express guaranty to pay a certain dividend on preferred stock entitles the holder to dividends only when there are profits out of which they can be paid.⁵ A contract to pay dividends on preferred stock at all

¹ *Union Pacific R. Co. v. United States*, (1878) 99 U. S. 402; *Nickals v. New York &c. R. Co.*, 15 Fed. Rep. 575; *Boardman v. Lake Shore &c. R. Co.*, (1881), 84 N. Y. 157; *Prouty v. Lake Shore &c. R. Co.*, 52 N. Y. 363; *Thompson v. Erie Ry. Co.*, 45 N. Y. 465; *Chaffee v. Rutland R. Co.*, (1882) 55 Vt. 110; *Elkins v. Camden &c. R. Co.*, 36 N. J. Eq. 233; *Belfast &c. R. Co. v. Belfast*, (1887) 77 Me. 445.

² *Chaffee v. Rutland R. Co.*, (1882) 55 Vt. 110, 126; *Corry v. Londonderry &c. Ry. Co.*, 29 Beav. 263; *McGregor v. Home Insurance Co.*, 33 N. J. Eq. 181; *St. John v. Erie R. Co.*, 10 Blatch. 271; s. c. 22 Wall. 136; *Lockhart v. Van Alstyne*, (1875) 31 Mich. 76; *Taft v. Hartford &c. R. Co.*, (1864) 8 R. I. 310.

³ *Bates v. Androscoggin &c. R. Co.*, 49 Me. 491.

⁴ *Henry v. Great Northern Ry. Co.*, 1 De Gex & J. 606, 637; 4 Kay, 1; *Crawford v. North Eastern &c. R. Co.*, 3 Jur. N. S. 1093.

⁵ *Lockhart v. Van Alstyne*, (1875) 31 Mich. 76; *Taft v. Hartford &c. R. Co.*, (1864) 8 R. I. 310; *Scott v. Central R. Co.*, 52 Barb. 45. There is always a condition, either expressed or implied, that they shall be paid only from the earnings of the enterprise. *Williston v. Michigan*

Southern R. Co., 13 Allen, 400; *Curran v. State*, 15 How. 304; *Pittsburgh &c. R. Co. v. Allegheny Co.*, 63 Pa. St. 126; *Evansville &c. R. Co. v. Evansville*, 15 Ind. 395; *In re Bristol &c. Ry. Co.*, L. R. 6 Eq. 448. Accordingly a general guaranty of dividends by a railroad company on its preferred stock is not a guaranty for payment in any event, but only in the event that the dividends are earned. *Miller v. Ratterman*, (Ohio, 1890) 8 Ry. & Corp. L. J. 69. The court in this case said: "It was not a stipulation to pay dividends in any event, but a stipulation to pay only out of surplus; for the company must be presumed to have proceeded in view of the terms of the second section of the act referred to, and the general rule of law on the subject. That rule is that payment of dividends to preferred stockholders differs from such payment to the holders of common stock only in that they are entitled to dividends in priority to any dividends upon the common stock. Dividends to either are to come from one common source, to wit, from funds properly applicable to the payment of dividends; that is to say, net earnings. In the nature of things, this must be so. As well might one member of a partnership be permitted to appro-

events, whether any profits are made or not, would be contrary to public policy and void.¹ But it has been decided, where a corporation authorized to issue preferred stock, after it had received a certain sum for each share, which shares should be payable in full on dissolution next after the payment of debts, guarantied that each share should receive semi-annual dividends of four dollars, that the guaranty was absolute and independent of the profits earned.²

§ 503. (c) **Arrears.**—Arrears of preferred dividends must be paid before a dividend can be declared upon the common stock.³ But in England the statute now declares that if in any year “there are not profits available for the payment of

priate to his own use assets of the firm to the prejudice of creditors as for a stockholder of a corporation to do it. A contract to permit this to be done would be contrary to public policy, and void. *Pierce, R. R.* 124, 125; *St. John v. Railway Co.*, 22 Wall. 136; *Lockhart v. Van Alstyne*, 31 Mich. 76; *Taft v. Hartford &c. R. Co.*, 8 R. I. 310; *Railroad Co. v. King*, 17 Ohio St. 534; 1 Ohio Rev. Stat., Smith & B. 935.”

¹ *Miller v. Ratterman*, (Ohio, 1890) 8 Ry. & Corp. L. J. 69; *St. John v. Railway Co.*, 22 Wall. 136; *Lockhart v. Van Alstyne*, (1875) 31 Mich. 76; *Evansville &c. R. Co. v. City of Evansville*, 15 Ind. 395.

² *Williams v. Parker*, (1884) 136 Mass. 204.

³ *Dana v. Fiedler*, 12 N. Y. 40; s. c. 62 Am. Dec. 130; *Prouty v. Michigan &c. R. Co.*, 1 Hun, 655; *Elkins v. Camden &c. R. Co.*, 36 N. J. Eq. 233; *Lockhart v. Van Alstyne*, (1875) 31 Mich. 76; *Taft v. Hartford &c. R. Co.*, (1864) 8 R. I. 310; *Henry v. Great Northern Ry. Co.*, 1 De G. & J., 606, where the defendant's counsel having likened the right of a preference shareholder to the right to bring a cup of a certain measure to be filled at each dividend meeting, if

there were enough to fill it, *Knight Bruce, L. J.*, said: “I may be excused for suggesting another case. Let us suppose a right to have a tun of wine from a vineyard. Is that the same merely as a right to have a tun of wine from a vintage? I do not think so. In the former case, the deficiency of an earlier would have to be supplied by a later vintage. Not so, possibly, in the other. Here, as I apprehend, the plaintiffs have a vineyard, and not merely the chance of a particular vintage to look to.” *Adams v. Fort Plain Bank*, 36 N. Y. 255; *Webb v. Earle*, L. R. 20 Eq. 556; *Sturge v. Eastern &c. Ry. Co.*, 7 De Gex, M. & G. 158; *Matthews v. Great Northern &c. Ry. Co.*, 28 L. J. Ch. 375; *Crawford v. North Eastern Ry. Co.*, 3 Jur. N. S. 1073; *Stevens v. South Devon Ry. Co.*, 9 Hare, 313; *Coe v. Belfast &c. Ry. Co.*, I. R. 2 C. L. 112; *Smith v. Cork &c. Ry. Co.*, I. L. R. 3 Eq. 356; *Coates v. Nottingham &c. Ry. Co.*, 30 Beav. 86; *Corry v. Londonderry &c. Ry. Co.*, 29 Beav. 263; *Lindley on Partnerships*, (2d ed.) 781. *Contra*, *Belfast &c. R. Co. v. Belfast*, 77 Me. 445; *Hazeltine v. Belfast & Moosehead R. Co.*, (1887) 79 Me. 411; s. c. 1 Am. St. Rep. 330.

the full amount of preferential dividend or interest for that year, no part of the deficiency shall be made good out of the profits of any subsequent year, or out of any other funds of the company.”¹ In some cases, however, under this act arrears have been held collectible. Thus where preference shareholders had allowed the surplus profits of one year to be applied in payment of dividends to ordinary shareholders, instead of in payment of dividends to them; they were not prevented from claiming arrears against the profits of succeeding years.² And where the whole net earnings of one year were appropriated to repairs, paying the preferred shareholders nothing, it was held that the arrears for that year might be recovered out of the profits of any subsequent year, although dividends had been paid in former years that should have been spent for repairs.³ Under by-laws which from their terms show that the whole net earnings are intended to be paid in each year, the dividends upon the preferred stock are not cumulative.⁴ When arrears are recoverable, interest thereon may be recovered also.⁵

§ 504. (d) Enforcement of payment.—A court of equity will, by injunction and other proper remedies, protect the rights of the holders of preferred stock.⁶ For a distinction is

¹The Companies. Clauses Act of 1863, 26 & 27 Vic. ch. 118, § 14.

²*Matthews v. Great Northern Ry. Co.*, 28 L. J. Ch. 375; *Smith v. Cork &c. Ry. Co.*, I. L. R. 3 Eq. 356.

³*Dent v. London Tramways Co.*, 16 Ch. Div. 344.

⁴This is the case where a by-law of a railroad company provided that “dividends on the preferred stock shall first be made semi-annually from the net earnings of said road, not exceeding a certain per centum per annum; after which dividend, if there shall remain a surplus, a dividend shall be made upon the non-preferred stock up to a like per cent. per annum, and should a surplus then remain of net earnings after both of said dividends, in any one year, the same shall be divided *pro*

rata upon all the stock.” *Hazeltine v. Belfast &c. R. Co.*, (1887) 79 Me. 411; s. c. 1 Am. St. Rep. 330. And so also where there is a statutory provision that dividends on preferred stock shall “not exceed” a certain percentage, and less than that percentage is paid, the deficit can not be claimed out of the profits of subsequent years. *Elkins v. Camden &c. R. Co.*, 36 N. J. Eq. 233; *Beach on Railways*, § 289.

⁵*Boardman v. Lake Shore &c. R. Co.*, 84 N. Y. 157.

⁶*Prouty v. Michigan &c. R. Co.*, 1 Hun, 655; *Thompson v. Erie Ry. Co.*, 45 N. Y. 468; *Boardman v. Lake Shore &c. R. Co.*, (1881) 84 N. Y. 157; *Bailey v. Hannibal &c. R. Co.*, 1 Dill. 174; *Ellsworth v. New York &c. R. Co.*, 98 N. Y. 648; *Henry*

made by the courts between declaring dividends upon preferred and on common stock. The directors of the corporation have a discretion as to the latter, but their action with respect to the former is subject to review by a court of equity.¹ But equity even will not interfere with a dividend unless it appear that somebody in particular was hurt or liable to be injured. It will not interfere for the sake of vindicating general principles after all danger has passed.² Where, however, the directors of a corporation neglect or refuse to pay a dividend to the preferred stockholders when the finances of the corporation justify it, and the stockholders are equitably entitled to receive it, a court of equity has jurisdiction of a bill to compel payment thereof.³ And the payment of dividends upon common stock will be restrained until the holders of guarantied stock have been paid.⁴ So also a preferential

v. Great Northern &c. Ry. Co., 4 Kay & J. 1; s. c. 1 De Gex & J. 606; *Sturge v. Eastern &c. Ry. Co.*, 7 De Gex, M. & G. 158; *Smith v. Cork &c. Ry. Co.*, 1 R. 3 Eq. 356. *Cf. Chase v. Vanderbilt*, 62 N. Y. 307.

¹ *Williston v. Michigan &c. R. Co.*, 95 Mass. 400; *Taft v. Hartford &c. R. Co.*, (1864) 8 R. 1. 310; *Belfast &c. R. Co. v. Belfast*, 77 Me. 445; *Bates v. Androscoggin &c. R. Co.*, 49 Me. 491; *West Chester &c. R. Co. v. Jackson*, 77 Pa. St. 321; *Prouty v. Lake Shore &c. R. Co.*, 52 N. Y. 563; *Hazeltine v. Belfast & M. H. L. R. Co.*, (1887) 79 Me. 411; *St. John v. Erie Ry. Co.*, (1874) 22 Wall. 136; *Bailey v. Railroad Co.*, 17 Wall. 96; *Thompson v. Erie Ry. Co.*, 45 N. Y. 468; *Dickinson v. Railroad Co.*, 7 W. Va. 390; *Richardson v. Vermont &c. R. Co.*, 44 Vt. 613; *Rutland &c. R. Co. v. Thrall*, 35 Vt. 536; *Barnard v. Vermont &c. R. Co.*, 89 Mass. 512.

² *Chaffee v. Rutland R. Co.*, (1882) 55 Vt. 110, 133; *Moore v. Hudson &c. R. Co.*, 12 Barb. 156; *Stevens v. South Devon R. Co.*, 9 Hare, 313;

Browne v. Monmouthshire Ry. &c. Co. 13 Beav. 32.

³ *Hazeltine v. Belfast &c. R. Co.*, (1887) 79 Me. 411; *Boardman v. Lake Shore &c. R. Co.*, (1881) 84 N. Y. 157; *Rutland &c. R. Co. v. Thrall*, 35 Vt. 536; *Williston v. Michigan &c. R. Co.*, 95 Mass. 400; *Barnard v. Vermont &c. R. Co.*, 89 Mass. 512; *Davis v. Proprietor &c.*, 49 Mass. 321; *Taft v. Hartford &c. R. Co.*, (1864) 8 R. 1. 310; *Belfast &c. R. Co. v. Belfast*, (1887) 77 Me. 445; *Bates v. Androscoggin &c. R. Co.*, 49 Me. 491; *Richardson v. Vermont &c. R. Co.*, 44 Vt. 613; *West Chester &c. R. Co. v. Jackson*, 77 Pa. St. 321; *Bryant v. Ohio College*, 1 Cin. 67; *St. John v. Erie Ry. Co.*, (1874) 22 Wall. 136; *Bailey v. Railroad Co.*, 17 Wall. 96; *Prouty v. Lake Shore &c. R. Co.*, 52 N. Y. 563; *Thompson v. Erie Ry. Co.*, 45 N. Y. 468; *Chase v. Vanderbilt*, 37 N. Y. Super. Ct. Rep. 334; *Dickinson v. Railroad Co.*, 7 W. Va. 390.

⁴ *Adams v. Fort Plain Bank*, 36 N. Y. 255; *Dana v. Fiedler*, 12 N. Y. 41; s. c. 62 Am. Dec. 130; *Prouty v. Michigan &c. R. Co.*, 1 Hun, 655.

shareholder may file a bill to restrain the company from making a dividend prejudicial to his rights without waiting until there are funds to make a dividend.¹ Preferred shareholders can not, however, maintain an action at law to enforce the payment of dividends which have not been declared.²

§ 505. Status of preferred shareholders.—Dividends upon preferred stock are not a debt that is guarantied, but constitute a right to a dividend from the earnings and income of the corporation. The right to a dividend is not a debt. There is no debt until the dividend is declared. The obligation and right to declare it does not arise until there is a fund from which it can properly be made.³ Therefore preferred shareholders are not creditors of the company.⁴ The relation of a holder of preferred stock is, in some of its aspects, similar to that of a creditor; but he is not a creditor save as to dividends, after they are declared. Nor does he sustain a dual relation to the corporation. He is either a stockholder or a creditor. He can not, by virtue of the same certificate, be both. If the former, he takes a risk in the concerns of the

¹ *Sturge v. Eastern &c. R. Co.*, 7 De G. M. & G. 158.

² *Williston v. Michigan &c. R. Co.*, 95 Mass. 400.

³ *Chaffee v. Rutland R. Co.*, (1882) 55 Vt. 110, 127; *In re London &c. Co.*, L. R. 5 Eq. 525. In the principal case it was said that it became necessary for the defendant, consisting of the second mortgage bondholders, to raise money to pay up the first mortgage in order to save the property from going on that mortgage. Two ways were open to them — one to borrow money, the other to sell stock. They decided to try the latter method. The pressure was severe upon them and the amount to be raised was large. The stock, in order to be sold, must be carefully guarded. The issue of the preferred stock in this case was made as it usually is, that is, when the corporation has reached a crisis in its affairs, and the

corporators are unwilling or unable to put more or sufficient money into the business, but are nevertheless disposed to give those who will do so a preference in profits. Careful guards are therefore usually thrown around preferred stock in the charter or contract, as was done in this case; but this did not change the character of the transaction. It was still an obtaining of funds by sale of stock, and not a borrowing of money on mortgage.

⁴ *Warren v. King*, 108 U. S. 389; *Belfast &c. R. Co. v. Belfast*, (1887) 77 Me. 445; *Chaffee v. Rutland &c. R. Co.*, (1882) 55 Vt. 110; *Taft v. Hartford &c. R. Co.*, (1864) 8 R. I. 310; *Pittsburg &c. R. Co. v. County of Allegheny*, 63 Pa. St. 126; *Lockhart v. Van Alstyne*, (1875) 31 Mich. 76; s. c. 18 Am. Rep. 156; *Bates v. Androscoggin &c. R. Co.*, 49 Me. 491.

company, not only as to dividends and a proportion of assets on the dissolution of the company, but as to the statutory liability for debts in case the corporation becomes insolvent. If the latter, he takes no interest in the company's affairs, is not concerned in its property or profits as such, but his whole right is to receive an agreed compensation for the use of the money he furnishes and the return of the principal when due. Whether he is the one or the other depends upon a proper construction of the contract he holds with the company.¹ Thus, under an act to enable railroad companies to redeem their bonded debts, which authorizes the issue of certificates of preferred stock and does not authorize the issue of certificates of indebtedness, the owners of certificates are stockholders, and not creditors of a corporation whose stockholders adopt a resolution authorizing the issue of a preferred stock, reciting that the stock is to be issued under and by virtue of the provisions of this act, which is referred to by its title and date of enactment, which resolution is made a part of the certificates thereafter issued by the company. For the terms of the act thereby become, in legal effect, a part of the certificates, and the certificates so issued will be held to be certificates of stock, unless, considering the whole transaction, it is clear that the purpose was to create a debt, and unless a debt was in fact created.² And under an act empowering certain counties to subscribe

¹ *Miller v. Ratterman*, (Ohio, 1890) 8 Ry. & Corp. L. J. 69. In this case it was further said that "a mortgage creditor, although denominated a 'preferred stockholder,' is a mortgage creditor nevertheless, and interest is not changed to dividend by calling it a dividend." "The question is not what did the parties call it, but what do the facts and circumstances require the court to call it? The aptness of this language arises in a case where it has been determined that such holder is a creditor. It may not furnish material aid in ascertaining the fact whether he is such or not. However, what the parties in the given case have called the subject of the contract is of no

little significance in determining their purpose, and when that purpose is ascertained it is of much importance in giving construction to the contract. The object of all rules of construction is to arrive at the meaning of the parties. What was the object to be accomplished? What did the parties intend, and are the means taken in harmony with that intent and with the law applicable to the subject? These are questions addressed to the court in this case, and when answered the case is decided."

² *Miller v. Ratterman*, (Ohio, 1890) 8 Ry. & Corp. L. J. 69, construing Ohio Laws of 1870, 89.

for preferred stock of a certain railroad, to bear seven per cent. interest, it was held that a county was not to be a creditor, but a stockholder, and that an expression in the certificate "prior and in preference to any dividend upon the capital stock of the company" is objectionable as implying that the county was not a stockholder.¹

§ 506. Preferred stock deferred to debts.—The stockholder must come after the creditor. The stock and property of a corporation is a trust fund pledged for the payment of its debts and the creditors' right to payment, and their lien is prior to the right of every stockholder.² Therefore earnings may be devoted to payment of a floating debt in preference to the payment of dividend upon preferred stock.³ But after payment of current expenses and interest upon its bonded indebtedness, a company can not in lieu of paying the remaining net earnings as a dividend to preferred shareholders, set it apart to provide a sinking fund for the payment of its bonded debt.⁴ And accordingly owners of preferred railroad

¹ State v. Cheraw &c. R. Co., 16 S. C. 524.

² Chaffee v. Rutland R. Co., (1882) 55 Vt. 110, 126, citing National Bank v. Douglass, 1 McCrary, 86; Railroad Co. v. Howard, 7 Wall. 392; Wood v. Dummer, 3 Mason, 308; Mumma v. Potomac Co., 8 Pet. 286; Curran v. Arkansas, 15 How. 304.

³ Chaffee v. Rutland &c. R. Co., (1882) 55 Vt. 110, 127. In this case the court disposes thus of the contrary claim: "The only earnings and income was the rental, which was insufficient to pay the operating expenses and the floating debt. Upon the plaintiff's theory there was an unqualified obligation to declare and pay dividends to preferred stockholders from the earnings and income, notwithstanding there were debts of the company greater than the earnings and income. Under this claim the rule universally recognized in the books that the property

of a corporation is a trust fund pledged for the payment of the debts of the corporation, and the distinction everywhere upheld between the stockholder and a creditor, would have been disregarded. In our view the terms of the charter neither force nor import such construction."

⁴ Hazeltine v. Belfast &c. R. Co., (1887) 79 Me. 411; s. c. 1 Am. St. Rep. 330. Here a railroad company leased its road for a term of fifty years, expiring in 1920, at the annual rent of \$36,000, the lessee undertaking to maintain the track, etc., and keep it in repair. There was a mortgage upon the road for \$150,000, payable in 1890; the annual interest thereon being about \$9,000. The company had no floating or unsecured debt, and there was a sum of \$32,412 of cash in the treasury after payment of the current expenses and interest on the mortgage. And it was held that the company was not entitled,

stock entitled to an annual non-accumulating dividend, dependent on a declaration of profits by a board of directors, can compel payment to themselves, when the board has reported more than sufficient net profits for the payment of the dividend, but has determined to use it all for the improvement of the road.¹ But equity will not interfere when by so doing an injustice would be wrought upon corporate creditors and the other stockholders, by taking money from the treasury without which the enterprise would be crippled.² Preferred stockholders who are entitled to receive interest in preference to the payment of dividends on the common stock, and after payment of the mortgage interest, are not to be considered prejudiced by the corporation issuing mortgage bonds consolidating prior and subsequent indebtedness.³ For the execution of a mortgage upon the whole line of a railroad for the purpose of raising funds for the company, and subsequent to the issuance by the corporation of preferred stock, is not in derogation of the rights of the preference stockholders, and an injunction will not issue to restrain the execution of the mortgage.⁴ Again, where preferred stock was entitled to preferred dividends out of the net earnings of the road after payment in full of mortgage interest and delayed coupons, and subsequently to the issue of this stock the company leased new roads and borrowed money for the repair and equipment of the road as it had a right to do, the rent of the new road and the interest on this borrowed money had priority over the preferred stock.⁵

§ 507. Right of preference shareholders in distribution of capital.— Ordinarily preferred stockholders are given no priority in the distribution of the capital of a corporation upon its dissolution or winding up. The preference generally given is merely a preference in the distribution of profits. When

as against the preferred stockholders, to retain the sum of \$19,900 as a contribution to a sinking fund to pay off the mortgage debt when it became due.

¹ *Nickals v. New York, Lake Erie &c. Ry. Co.*, 15 Fed. Rep. 575.

² *Culver v. Reno &c. Co.*, 91 Pa. St. 367.

³ *Thompson v. Erie R. Co.*, 45 N. Y. 468; s. c. 42 How. Pr. 68.

⁴ *Garrett v. May*, 19 Md. 177.

⁵ *St. John v. Erie Ry. Co.*, 22 Wall. 137; s. c. 10 Blatch. 271.

this is the case and there is no provision for the division of the capital upon the breaking up of the corporation, any surplus remaining after the payment of debts must be distributed among the shareholders according to their shares, without reference to their rights in respect to dividends.¹ A preference, however, in the distribution of capital, as well as in the distribution of profits, is not very unusual,² and is sometimes authorized by the articles of association,³ being under some

¹ *McGregor v. Home Ins. Co.*, 33 N. J. Eq. 181; *In re London & Co.*, L. R. 5 Eq. 519; *Griffith v. Paget*, 6 Ch. Div. 511, where Malins, V.-C., said: "All these companies are commercial partnerships, and are, in the absence of express provisions, statutory or otherwise, subject to the same considerations. If, in an ordinary commercial partnership, one or more of the partners has a larger share of the profits than is the proportion borne by his share of the capital to the capital of the others, whether on account of his services (which is the more frequent ground in cases of partnership for giving the larger share), or on account of the services of others formerly given to the partnership, which is sometimes done, especially in the case of a second or third generation, that privilege ceases when the partnership is dissolved. If you give an annuity out of profits to a widow during the continuance of the partnership, she having no share of the capital, of course that *ex vi termini* will come to an end at the dissolution of the partnership. If you give a managing partner a salary, or a larger share of the profits than his proportion of the capital, of course at the dissolution the management comes to an end and his large share of the profits. But in the ordinary case, when the profits are unequally divided, that is, unequally as regards the share of capital, the same rule prevails, and

that is quite independent of the circumstances whether the excess of profits is given for services or given to a sleeping partner for the use of his name or otherwise. When the partnership comes to an end, the right of the share of the profits comes to an end also, and you distribute the assets, after providing for the profits earned up to the time of distribution, in proportion to the partners' shares of the partnership capital. That is the general rule of law in a commercial partnership. Therefore you would distribute the assets simply in proportion to the capital. This is a commercial partnership. Therefore if there were no provision to be found anywhere, you would distribute the assets in proportion to the capital, and the mere arrangement for the division of profits *inter se* during the continuance of the partnership, would have no direct bearing on the division of the capital, as distinguished from profits earned up to the time of the dissolution, after the dissolution of the company."

² *Taft v. Hartford & Co. R. Co.*, (1864) 8 R. I. 310; *West Chester & Co. R. Co. v. Jackson*, 77 Pa. St. 321.

³ *Melhado v. Hamilton*, 21 W. R. 619; *Hutton v. Scarborough & Co.*, 2 Drew. & Sim. 514. Thus where a company, having power to increase its capital to such amount and upon such terms and either with or without special privileges or preferences

circumstances the only means of raising a working capital for the business.¹ So under a general statute directing that in the distribution of capital the holders of preferred stock shall be first paid, before any distribution is made to the holders of the common stock, preferred stock is entitled to preference in the distribution of capital.² In distributing the assets after payment of debts, no account should be taken of dividends previously paid to preferred stockholders.³

§ 508. Exchanging common for preferred stock.— Preferred stock may be issued for the purpose of exchanging and retiring the common stock.⁴ If the proposition to common stockholders to take preferred stock, on the surrender of part of these shares or an additional payment, or the like, contains any time limit, it is of the essence of the offer.⁵ If no time is

to the holders of the shares in the increased capital, as it should deem expedient, raised further capital by the issue of shares entitled to a preferential interest of ten per cent. per annum, the amount of the shares to be repaid on six months' notice, with twenty-five per cent. bonus, the payment of interest, repayment and bonus to take place before any dividend, interest or other money was payable to the original shareholders, it was held that the company had conferred a preference as to capital as well as dividends upon the new shareholders, and that they were entitled to the surplus in preference to the original shareholders. *In re Bangor &c. Co.*, L. R. 20 Eq. 59.

¹ *In re Bangor &c. Co.*, L. R. 20 Eq. 59.

² *McGregor v. Home Ins. Co.*, 33 N. J. Eq. 181. Under Virginia Act of Dec. 13, 1865, authorizing the defendant corporation to increase its capital stock to such extent as might be requisite to enable it to liquidate all arrears of debts, interest, and dividends, and to make such portion of the increased capital stock as it might deem advisable a guaranteed

stock, on which dividends of not exceeding seven per cent. per annum might be guaranteed, it was held that in case of a division of assets, these guaranteed stockholders must be paid, if need be, to the exclusion of the holders of common stock. *Gordon v. Richmond &c. R. Co.*, 78 Va. 501.

³ *Griffith v. Paget*, 6 Ch. Div. 511.

⁴ *West Chester &c. R. Co. v. Jackson*, (1875) 77 Pa. St. 321. The New York "Stock Corporation Law" of 1890, provides: Every domestic corporation having preferred and common stock may upon the written request of the holder of any preferred stock by a two-thirds vote of the directors, exchange the same for common stock, and issue certificates for common stock therefor share for share, or upon such other valuation as may have been agreed upon in the scheme for the organization of such corporation, or the issue of preferred stock; but the total amount of capital stock shall not be increased thereby. N. Y. Laws of 1890, ch. 564, § 47.

⁵ *Pearson v. London &c. R. Co.*, 14 Sim. 541; *Muhlenberg v. Philadelphia &c. R. Co.*, 47 Pa. St. 16.

thus fixed, the right must be exercised within a reasonable time. The principle on which it is held that where, in an executory contract, one stipulates to do some act, and no time is limited, it is to be done in a reasonable time, applies where one is entitled to a privilege, or receives an offer, of which he may at his own option take advantage. He must avail himself of the privilege and exercise his option within a reasonable time.¹ A delay of thirty-three years has been held unreasonable.²

§ 509. **Special stock.**—The characteristics of the special stock of Massachusetts are, that it is limited in amount to two-fifths of the actual capital; it is subject to redemption by the corporation at par after a fixed time, to be expressed in the certificates; the corporation is bound to pay a fixed half-yearly sum or dividend upon it as a debt; the holders of it are in no event liable for the debts of the corporation beyond their stock; and the issue of special stock makes all the general stockholders liable for all debts and contracts of the corporation until the special stock is fully redeemed.³ The guaranty of dividends upon this stock is not conditioned upon the profits of the enterprise.⁴ And where there are no profits, they must be paid out of any property owned by the company; the holders of stock of this kind being regarded as creditors of the corporation in respect of the guarantied dividends.⁵ As the statute defines the mode in which special stock may be issued, a departure from the statutory requirements invalidates the issue; as, for instance, where at a meeting called to consider whether preferred stock shall be issued, a vote to issue special stock is had, or where the record fails to show the assent of the required number of stockholders. And a

¹ *Wilson v. Clements*, 3 Mass. 1, 13; 1870, ch. 224, §§ 25, 39; *Pub. Stat. Atwood v. Cobb*, 16 Pick. 227; *Loring v. Boston*, 7 Metc. 410, 414; *Holland v. Cheshire Ry. Co.*, (Mass. 1890) 24 N. E. Rep. 206; s. c. 8 Ry. & Corp. L. J. 49.

1870, ch. 224, §§ 25, 39; *Pub. Stat. ch. 106*, §§ 42, 61; *American Tube Works v. Boston &c. Co.*, (1885) 139 Mass. 5.

² *Holland v. Cheshire R. Co.*, (Mass. 1890) 8 Ry. & Corp. L. J. 49.

⁴ *Williams v. Parker*, (1884) 136 Mass. 204; *Allen v. Herrick*, 81 Mass. 274.

³ Mass. Stats. of 1855, ch. 290; of

⁵ *Williams v. Parker*, (1884) 136 Mass. 204.

holder of stock thus illegally issued can not, by estoppel or otherwise, become a member in respect to such shares.¹ But a holder of special stock which is illegally issued, may prove against the estate of the corporation in insolvency the amount paid by him for the stock, deducting any dividends received, although he did not rescind the contract before insolvency.²

¹ American Tube Works v. Boston &c. Co., 139 Mass. 5. ² Reed v. Boston &c. Co., (1886) 141 Mass. 454.

CHAPTER XXVI.

SUBSCRIPTIONS TO STOCK.

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| <p>§ 510. Introductory.</p> <p>511. Construction of contracts.</p> <p>512. Preliminary contracts.</p> <p>513. Signing articles of association.</p> <p>514. Application, allotment and notice.</p> <p>515. Cash deposits.</p> <p>516. Subscriptions to obtain charter.</p> <p>517. Subscriptions to obtain charter not to be conditional.</p> <p>518. Who may receive subscriptions.</p> <p>519. Commissioners.</p> <p>520. Limitation of the amount of a single subscription.</p> <p>521. Subscriptions in excess of the capital stock.</p> <p>522. Competency to subscribe —</p> <p style="padding-left: 20px;">(a) Natural and artificial persons.</p> <p style="padding-left: 20px;">(b) Municipal corporations.</p> <p>524. Municipal subscriptions.</p> <p>525. Municipal subscriptions may be conditional.</p> <p>526. Municipal subscriptions as affected by consolidation.</p> <p>527. Fraud in procuring subscriptions.</p> <p>528. Qualification of the foregoing rule.</p> <p>529. Misrepresentations in prospectuses.</p> | <p>§ 530. Parol evidence of fraud.</p> <p>531. Parol agreements and conditions.</p> <p>532. Conditions precedent.</p> <p>533. Conditions subsequent.</p> <p>534. Recitals as implied conditions.</p> <p>535. Recitals as to the amount of capital stock.</p> <p>536. The same subject continued.</p> <p>537. Valid and void conditions.</p> <p>538. Secret and separate conditions.</p> <p>539. Performance of conditions.</p> <p>540. Substantial performance.</p> <p>541. Non-performance.</p> <p>542. Waiver of performance.</p> <p>543. Fraudulent agreements.</p> <p>544. Irregular subscriptions.</p> <p>545. Waiver of irregularities.</p> <p>546. Effect of legislation upon subscription contracts.</p> <p>547. Effect of consolidation.</p> <p>548. Failure of consideration.</p> <p>549. Withdrawal and abandonment.</p> <p>550. Substitution of subscribers.</p> <p>551. Specific performance — Damages.</p> <p>552. The Statute of Limitation.</p> <p>553. The same subject continued.</p> <p>554. The same subject continued — The Glenn Cases.</p> |
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§ 510. Introductory.— There are cases in which it has been said that no written subscription is necessary in the formation of joint-stock companies.¹ Contracts of this char-

¹ *National Bank v. Van Derwerker*, (1878) 74 N. Y. 234; *Pettis v. Atkins*, (1871) 60 Ill. 454.

acter are not considered as within the statute of frauds in Kentucky, even though payment is not to be made until the organization of the company at some indefinite future time.¹ So in Indiana, it is held that a stipulation that certain things shall be done by the company within a time longer than one year, does not bring the contract within the statute of frauds where it *may be* performed within one year.² A municipal subscription to the stock of a railway need not be in writing. A resolution by the proper board of officers or agents declaring the subscription to be made, acceptance on the part of the railway and notice thereof to the municipality, is sufficient; and a contract made in that manner is binding upon both parties although there has been no exchange of the bonds of one for the stock of the other.³ But generally a contract to take shares in the capital stock of an incorporated company, must be in writing,⁴ and must be such as to constitute a valid and complete contract on both sides.⁵ To this end it is requisite

¹ The statute of frauds (Gen. Stat. Ky. ch. 22, § 1), providing that no action shall be brought to charge any one upon any agreement which is not to be performed within one year, unless the agreement is in writing, refers to contracts which are not to be performed within a year from the making of them, not to those that *may be* performed within that time. *Bullock v. Fal-mouth & Chipman Hall Turnpike Road Co.*, (1887) 85 Ky. 184.

² *Strangham v. Indianapolis &c. R. Co.*, 38 Ind. 185.

³ *Bates County v. Winters*, 112 U. S. 325; *Cass County v. Gillett*, 100 U. S. 585; *Nugent v. Supervisors*, 19 Wall. 241; *State v. Jennings*, 4 Wis. 549; *Beach on Railways*, § 218, where it said that the vote of the people, however, in favor of the subscription, does not amount to a contract of subscription, nor vest in the railway a right to enforce specific performance, where the enabling act confers any discretion in relation to the matter, upon the officers of the

municipality; *Bates County v. Winters*, 97 U. S. 83; *Wadsworth v. St. Croix County*, 4 Fed. Rep. 370; *Syracuse Savings Bank v. Town of Seneca Falls*, 86 N. Y. 317; *Cumberland &c. R. Co. v. Barren County*, 10 Bush, 604; *Winter v. City Council of Montgomery*, 65 Ala. 403; *People v. Jackson County*, 92 Ill. 441; *People v. Pueblo County*, 2 Cal. 360. *Cf.* *Bank of Statesville v. Town of Statesville*, 84 N. C. 169.

⁴ *Bouwer v. Appleby*, 1 Sandf. N. Y. 170; *Vreeland v. New Jersey Stone Co.*, 29 N. J. Eq. 188; *Fanning v. Hibernia Ins. Co.*, 37 Ohio St. 339; *Pittsburgh & S. R. Co. v. Gazzam*, 32 Pa. St. 340; *Galveston Hotel Co. v. Bolton*, 46 Tex. 633; *Fothergill's Case*, L. R. 8 Ch. App. 270; *Thames Tunnel Co. v. Sheldon*, 6 B. & C. 341; *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294; *Note to Parker v. Thomas*, 81 Am. Dec. 392, 396.

⁵ *Belfast & M. L. R. Co. v. Moore*, 60 Me. 561; *Bucher v. Dillsburg & M. R. Co.*, 76 Pa. St. 306; *Dutchess &c. R. Co. v. Mabbett*, 58 N. Y. 397.

on the one hand that it be unconditionally delivered to an agent of the company authorized to receive subscriptions,¹ and on the other hand that it be accepted by the corporation.² The offer must be accepted, if at all, within a reasonable time.³ A person can not be held bound by a subscription to

See *Lake Ontario Shore R. Co. v. Curtiss*, 80 N. Y. 219; "Subscriptions to the Capital Stock of Corporations," by James M. Kerr, (1890) 6 Ry. & Corp. L. J. 422.

¹For there can be no acceptance of an escrow subscription until its final delivery to the company. *Cass v. Pittsburgh &c. Ry. Co.*, 80 Pa. St. 31. But it is held that a delivery of a subscription of that character to an agent of the company who is taking subscriptions, or to a director, does not destroy its character as an escrow. *Cass v. Pittsburgh &c. R. Co.*, 80 Pa. St. 31; *Ottawa &c. R. Co. v. Hall*, 1 Bradw. 612; *Beach on Railways*, § 76. For a subscription delivered in escrow is, strictly speaking, no subscription until the occurrence of the contingency upon which it was to be a second time delivered; and it can only be delivered to the corporation upon the happening of that event. *Ottawa &c. R. Co. v. Hall*, 1 Bradw. 612; *Ashtabula &c. R. Co. v. Smith*, 15 Ohio St. 328.

²*Fanning v. Insurance Co.*, 37 Ohio St. 539; *Thames Tunnel Co. v. Sheldon*, 6 Barn. & C. 341. Where the subscription is made in the manner provided by statute, acceptance by the company is presumed; but when it is irregularly made (*Brownlee v. Ohio &c. R. Co.*, 18 Ind. 68; *Ashtabula &c. R. Co. v. Smith*, 15 Ohio St. 328; *Eppes v. Mississippi &c. Co.*, 35 Ala. 33; *New Albany &c. R. Co. v. McCormick*, 10 Ind. 499; s. c. 71 Am. Dec. 337; *Clark v. Continental &c. Co.* 57 Ind. 134; *Sewall v. Eastern R. Co.*, 9 Cush. 5; *Parker*

v. Northern &c. R. Co., 33 Mich. 23; *Carlisle v. Saginaw &c. R. Co.*, 27 Mich. 315; *St. Paul &c. R. Co. v. Robbins*, 23 Minn. 439; *Gulf &c. Ry. Co. v. Neely*, 64 Tex. 344. Cf. *Silpher v. Earhart*, 83 Ind. 178; *Cincinnati &c. R. Co. v. Pearce*, 28 Ind. 502), or made conditionally, acceptance must be proven in order to bind the subscriber. *Taggart v. Western Maryland R. Co.*, 24 Md. 563; *Galt v. Swain*, 9 Gratt. 633; s. c. 50 Am. Dec. 311; *Junction R. Co. v. Reeve*, 15 Ind. 236; *Lowe v. Edgefield &c. R. Co.*, 1 Head, (Tenn.) 659; *Ashtabula &c. R. Co. v. Smith*, 15 Ohio St. 328. This may be shown by the corporation entering the subscription upon its records, (*New Albany &c. R. Co. v. McCormick*, 10 Ind. 499; s. c. 71 Am. Dec. 337) or it may even be shown by parol evidence. *Mansfield &c. R. Co. v. Smith*, 15 Ohio St. 328. Acceptance by a president of the company, all of whose acts are afterwards ratified by the directors, is sufficient to bind the company and the subscriber. *Pittsburgh &c. R. Co. v. Stewart*, 41 Pa. St. 54; *Beach on Railways*, § 85. Notice of acceptance is not requisite, (*Brownlee v. Ohio &c. R. Co.*, 18 Ind. 68), unless required by statute. *Eppes v. Mississippi &c. R. Co.*, 35 Ala. 33.

³*Ward's Case*, L. R. 10 Eq. 659. A conditional subscription being a continuing offer merely, it may be recalled if acceptance is unreasonably deferred. *Taggart v. Western Maryland &c. R. Co.*, 24 Md. 563; *Beach on Railways*, § 86.

an incomplete copy of the articles of association;¹ nor when the names of the directors were left blank and afterwards filled without their consent.² Directors are personally liable for refusal to receive subscriptions.³

§ 511. Construction of contracts.—The same rules are generally applicable in the construction of contracts of subscription to the capital stock of companies as control the construction of other ordinary contracts, the aim of the court being always to discover the intent and meaning of the parties as indicated by the language employed by them, taken in connection with the circumstances attending each particular case.⁴ The rule that a formal written contract, which appears upon its face to be complete, can not be enlarged, modified, or contradicted by proof of prior or contemporaneous parol negotia-

¹ *Dutchess &c. R. Co. v. Mabbett*, 58 N. Y. 397; *Bucher v. Dillsburg &c. R. Co.*, 76 Pa. St. 306.

² *Dutchess &c. R. Co. v. Mabbett*, 58 N. Y. 397.

³ *Union Bank v. McDonough*, 5 La. 63. *Contra*, *Ferguson v. Wilson*, L. R. 2 Ch. 77. *Cf.* *Swift v. Jewsbury*, L. R. 2 Q. B. 301.

⁴ *Cravens v. Eagle Cotton M. Co.*, (1889) 120 Ind. 600; s. c. 6 Ry. & Corp. L. J. 411; *Detroit &c. R. Co. v. Starnes*, 38 Mich. 698; *Beach on Railways*, § 99. In the case first cited the plaintiff corporation was organized for the purpose of acquiring and operating a cotton mill, a proposition by another corporation to sell its cotton mill and plant being at the time under consideration by the incorporators of plaintiff, and defendant subscribed to plaintiff's capital stock on condition that the subscription was not to be payable until the contract with the other corporation had been ratified by a majority of the stockholders. *Mitchell, J.*, delivering the opinion of the court, held in an action to enforce defendant's subscription, where he de-

fended on the ground that the terms of contract between the two corporations had been changed, that it was competent for plaintiff to show that no contract had been consummated at the time of defendant's subscription, and that it was apparent that the contract referred to was only contemplated. Under such a subscription it is not a condition precedent to defendant's liability that plaintiff shall enter into a contract of a particular kind with the other corporation, and in an action to enforce his subscription he can not assail a contract thereafter made with the corporation, which has been ratified as provided. One who has contracted with a corporation as such is estopped to deny its legal existence. For examples of the construction of conditional contracts of subscription see: *Berryman v. Cincinnati &c. R. Co.*, 14 Bush, 755; *People v. Holden*, 82 Ill. 93; *Connecticut &c. R. Co. v. Baxter*, 32 Vt. 805; *Iowa &c. Ry. Co. v. Bliobenes*, 41 Iowa, 267; *Courtright v. Strickler*, 37 Iowa, 382; *Beach on Railways*, § 99.

tions or agreements, is abundantly settled, and receives the fullest recognition in the decisions of the courts.¹ It is equally well settled, however, that the first duty of the court in interpreting a contract is to discover the intention of the parties, and while that must be done solely by considering the meaning of the language employed in the instrument, yet when the terms employed are susceptible of more than one meaning, it is the duty of the court not only to regard the nature of the instrument, but also to inform itself of the circumstances which surrounded the parties at the time, so as to interpret the language employed from the standpoint which the parties occupied when they executed the contract.² Circumstances which afterwards arose, are not to be considered in construing its meaning.³ If the words of the instrument are clear in themselves, it must be construed accordingly; but if they are susceptible of more meanings than one, the court must avail itself of the light enjoyed by the parties when the contract was executed, so as to arrive at the meaning of the words and give them a correct application to the persons and things described.⁴ The court may not deviate therefrom, on account of the contract so interpreted being unwise for either party.⁵ Where the language employed admits of more than one construction, one of which renders the contract insensible, that construction will be adopted which will give effect to the contract, and in cases of doubt the practical construction which the parties themselves have given it will be of great, if not controlling, influence.⁶ Accordingly it is essential in order

¹ *Cravens v. Eagle Cotton M. Co.*, (1889) 120 Ind. 600; *s. c.* 6 Ry. & Corp. L. J. 411; *Manufacturing Co. v. Forsyth*, 108 Ind. 334; *Carr v. Hays*, 110 Ind. 408; *Tucker v. Tucker*, 113 Ind. 272. *Vide infra*, § 531.

² *Cravens v. Eagle Cotton Mills Co.*, (Ind. 1889) 6 Ry. & Corp. L. J. 411; *Heath v. West*, 68 Ind. 548; *Ketcham v. Coal Co.*, 88 Ind. 529; *Nash v. Towne*, 5 Wall. 689-699; *Scott v. United States*, 12 Wall. 443; *Canal Co. v. Hill*, 15 Wall. 94; *Reed v. Insurance Co.*, 95 U. S. 23; *Reynolds v. Insurance Co.*, 47 N. Y. 597.

³ *Detroit &c. R. Co. v. Starnes*, 38 Mich. 698; *Monadnock R. Co. v. Felt*, 52 N. H. 379.

⁴ *Cravens v. Eagle Cotton Mills Co.*, (Ind. 1889) 6 Ry. & Corp. L. J. 411, citing *Springsteen v. Samson*, 32 N. Y. 703.

⁵ *Memphis &c. R. Co. v. Thompson*, 24 Kan. 170.

⁶ *Cravens v. Eagle Cotton Mills Co.*, (Ind. 1889) 6 Ry. & Corp. L. J. 411; *Ashtabula &c. R. Co. v. Smith*, 15 Ohio St. 328; *Reissner v. Oxley*, 80 Ind. 580; *Lyles v. Lescher*, 108 Ind. 382; *Chicago v. Sheldon*, 9 Wall. 50.

that the contract of subscription may be intelligently applied to the collateral matters therein referred to, that the court should be informed of the circumstances existing at the time the subscription was made.¹ The meaning of an ambiguous contract is a question of fact for the jury.²

§ 512. Preliminary contracts.—A mere informal promise to take stock before the articles of association have been signed, does not constitute a contract of subscription.³ Thus

¹ *Cravens v. Eagle Cotton M. Co.*, (1889) 40 Minn. 110; s. c. 12 Am. St. Rep. 701. *Cf.* *Note to Parker v. L. J.* 411, 413, where Mitchell, J., delivering the opinion of the court, continued: "It was therefore competent for the plaintiff, when the appellant claimed exoneration from his subscription, on the ground that the contract between the two companies in respect to the amount of stock which the Pittsburgh company had agreed to subscribe, or the terms upon which it had agreed to sell its mills, had been changed, or that the agreement had been varied in any other respect, to show that no contract had in fact been consummated, and that the situation of the parties was such as to make it apparent that the contract referred to was one that might possibly be made in the future. This in no way tended to alter or modify the contract of subscription, but to give it intelligent application to the collateral matters to which it referred."

² *Connecticut R. Co. v. Baxter*, 32 Vt. 805.

³ *Fanning v. Hibernia Ins. Co.*, 37 Ohio St. 339; s. c. 41 Am. Rep. 517; *Troy & C. R. Co. v. Tibbits*, 18 Barb. 297; *Troy & C. R. Co. v. Warren*, 18 Barb. 310; *Thrasher v. Pike County R. Co.*, 25 Ill. 393; *Charlotte & C. R. Co. v. Blakely*, 3 Strobb. 245; *Mt. Sterling Coal Road Co. v. Little*, 14 Bush, 429. But see *Minneapolis Threshing Machine Co. v. Davis*, (1889) 40 Minn. 110; s. c. 12 Am. St. Rep. 701. *Cf.* *Note to Parker v. Thomas*, 81 Am. Dec. 392, 397. The defendant agreed to subscribe to the stock of a company, providing a certain appointment was secured for him, but declaring at the same time that he could not then subscribe for the stock. He subsequently authorized the party soliciting for subscription to the stock to appear for him by proxy at the meeting of the stockholders, in anticipation of his future subscription to the stock, which was never made, and it was held, that giving the proxy was not a ratification by the defendant of the act of the one to whom it was given, in having signed defendant's name on the stock-book of the company as a subscriber without his knowledge. *McClelland v. Whitely*, 15 Fed. Rep. 322. Neither can one be held liable upon an oratorical declaration at a public meeting of a corporation, to the effect that he would spend half of his estate if need be to insure the success of the scheme. *Andover & C. Co. v. Hay*, 7 Mass. 102. Several persons signed a paper purporting to be an agreement to take stock in a corporation, which, as the paper recited, was about to be formed; afterwards the paper was signed by the president and secretary, and the corporate seal affixed, and an action brought to recover from one of the subscribers the price named in the

it is held that an oral promise, pending the organization of a corporation, to take shares of the stock does not constitute the promisor a stockholder or member, and will not support a note given to pay for shares.¹ These preliminary subscriptions are said to be mere continuing offers to take stock upon the organization of the corporation, which must be accepted by the company before an action will lie.² But a subscription by a number of persons to the stock of a corporation, to be thereafter formed by them, constitutes a contract between the subscribers to become stockholders when the corporation is formed, upon the conditions expressed in the agreement, and is irrevocable from the date of the subscription. It is in the nature of a continuing offer to the proposed corporation, which, upon acceptance by it, becomes as to each subscriber a contract between him and the corporation.³ A promoter of

paper. The complaint did not state when the company was incorporated, and it was not shown that any of the subscribers joined in its formation or membership, or were authorized to sell any of the stock, and it was held that the action could not be maintained. *California Sugar Manuf. Co. v. Schafer*, 57 Cal. 396.

¹ *Fanning v. Hibernia Ins. Co.*, 37 Ohio St. 339; s. c. 41 Am. Rep. 517.

² *Starrett v. Rockland &c. R. Co.*, 65 Me. 374. Cf. "Agreements to Take Shares in Joint-Stock Companies," 10 Sol. J. & Rep. 1081, 1112, 1133 (three articles).

³ *Minneapolis Threshing Machine Co. v. Davis*, (1889) 40 Minn. 110; s. c. 12 Am. St. Rep. 701; *Starrett v. Rockland &c. R. Co.*, 65 Me. 374; *Buffalo &c. R. Co. v. Gifford*, 87 N. Y. 294; *Rensselaer &c. R. Co. v. Barton*, 10 N. Y. 457; *Buffalo &c. R. Co. v. Dudley*, 14 N. Y. 336; *Lake Ontario &c. R. Co. v. Mason*, 16 N. Y. 451, 463; *Buffalo &c. R. Co. v. Clark*, 22 Hun, 359; *Kirkey v. Florida R. Co.*, 7 Fla. 23; s. c. 68 Am. Dec. 426; *Peninsula &c. R. Co. v. Duncan*, 28 Mich. 130; *Sanger v. Upton*, 91 U. S.

59; *Webster v. Upton*, 91 U. S. 65; *Bene v. Cahawba &c. R. Co.*, 3 Ala. 660; *Selma &c. R. Co. v. Tipton*, 5 Ala. 787; s. c. 39 Am. Dec. 394; *Thigpen v. Mississippi &c. R. Co.*, 32 Miss. 347; *Penobscot &c. R. Co. v. Dummer*, 40 Me. 172; s. c. 63 Am. Dec. 654; *Hartford &c. R. Co. v. Kennedy*, 12 Conn. 499; *Klein v. Alton &c. R. Co.*, 13 Ill. 514; *Banet v. Alton &c. R. Co.*, 13 Ill. 504; *Heaton v. Cincinnati &c. R. Co.*, 16 Ind. 275; s. c. 79 Am. Dec. 430. *Acc.* *Hamilton &c. Co. v. Rice*, 7 Barb. 157; *Anderson v. Newcastle &c. R. Co.*, 12 Ind. 376; s. c. 74 Am. Dec. 218; *Hughes v. Antietam &c. Co.*, 34 Md. 316. But see cases cited *supra*, p. 129, note 3, and *Poughkeepsie &c. R. Co. v. Griffin*, 24 N. Y. 150; *Charlotte &c. R. Co. v. Blakely*, 3 Strobb. L. 245; *Pittsburgh &c. R. Co. v. Gazzam*, 32 Pa. St. 340; *Chase v. Sycamore &c. R. Co.*, 38 Ill. 215. In *Carlisle v. Saginaw &c. R. Co.*, 27 Mich. 315; s. c. 10 Am. Ry. Rep. 283, the statute of incorporation enacting that subscriptions to the stock of a railway should be made only in the manner to be provided in its by-

a proposed corporation, who solicits and procures stock subscriptions, is the agent of the body of the subscribers to hold the subscriptions until the corporation is formed, and then turn them over to it without any further act of delivery on the part of the subscribers, and a delivery of a subscription to him is a complete delivery, so that it becomes *eo instanti* a binding contract as between the subscribers.¹ Subscriptions made prior to incorporation, however, are deemed to be conditional upon due performance of all acts requisite to the establishment of the organization as a corporate body.² And there are cases holding that a subscriber is at liberty to withdraw at any time before the filing of the articles of association,³ notwithstanding his having induced others to subscribe.⁴ But his associates have an action against one who refuses to carry out the agreement, for such damages as they may have sustained by reason of his refusal.⁵

§ 513. Signing articles of association.—Subscriptions to the capital stock of corporations formed under general enabling acts are frequently made by writing the number of shares

laws, it was held that subscriptions made before the adoption of by-laws were not enforceable, although one of the by-laws subsequently passed expressly ratified them. *Beach on Railways*, § 85; *Melhado v. Porto Alegre &c. Ry. Co.*, L. R. 9 C. P. 503. *Cf. Carlisle v. Saginaw &c. R. Co.*, 27 Mich. 315; *Sewell v. Eastern R. Co.*, 9 Cush. 5; *Sedalia &c. Ry. Co. v. Wilkerson*, 83 Mo. 235; *Phoenix &c. Co. v. Badger*, 67 N. Y. 294; *Buffalo &c. R. Co. v. Hatch*, 20 N. Y. 157; *Erie &c. R. Co. v. Owen*, 32 Barb. 616; *Garrett v. Dillsburg &c. R. Co.*, 78 Pa. St. 465; *Rikhoff v. Brown's Rotary &c. Co.*, 68 Ind. 388.

¹ *Minneapolis Threshing Machine Co. v. Davis*, (1889) 40 Minn. 110; s. c. 12 Am. St. Rep. 701.

² *Vide* cases cited *supra*, p. 128, note 5.

³ *Holt v. Winfield Bank*, 25 Fed. Rep. 812; *Garrett v. Dillsburg &c.*

R. Co., 78 Pa. St. 465, and cases cited *supra*, p. 129, note 1, and *infra*, § 548. This is the view taken by Mr. Wood in his treatise on *Railway Law*, § 26, where he says, it is difficult to see how a subscription made before the corporation was incorporated can be enforced, unless the subscriber *after* the incorporation does some act in affirmance of his former promise. See *Strasburg R. Co. v. Echternach*, (1853) 21 Pa. St. 220; s. c. 60 Am. Dec. 49; *Thrasher v. Pike County R. Co.*, (1861) 25 Ill. 393; *Mt. Sterling Coal Road Co. v. Little*, (1879) 14 Bush, 429.

⁴ *Muncy Traction Engine Co. v. Green*, (Pa. 1888) 13 Atlan. Rep. 747; s. c. 21 Am. & Eng. Corp. Cas. 328; s. c. 12 Cent. Rep. 386. *Contra*, *Cook v. Crittenden Bank*, 25 Fed. Rep. 544.

⁵ *Lake Ontario &c. R. Co. v. Curtiss*, (1880) 80 N. Y. 219.

intended to be taken by each incorporator opposite his signature to the articles of association.¹ Subscriptions so made are presumed to be accepted by the corporation, are equally binding upon it and upon the subscriber,² and take effect upon the filing of the certificate as required by the statute.³ If, however, the enabling act require the articles to be acknowledged before an officer, one who has subscribed in the manner above stated, but who has not joined in the acknowledgment, can not be held bound as upon a complete contract.⁴ So, also, where the enabling act requires the articles to be filed, and the subscription was made upon a duplicate copy thereof which was not filed, the contract remains incomplete.⁵

§ 514. Application, allotment and notice.—The English method of taking shares in companies having capital stock is by application, allotment and notice, the latter being of the essence of the contract,⁶ which is thereby concluded, and the contract dates from the mailing of the notice,⁷ whether it ever reaches the allottee or not.⁸ Accordingly, in order to constitute a valid allotment of shares, there must be an ap-

¹ *Coppage v. Hutton*, (Ind. 1890) 24 N. E. Rep. 112; *Nulton v. Clayton*, 54 Iowa, 425; *Erie & C. R. Co. v. Owen*, 32 Barb. 616; "Signing the Memorandum of Association and its Consequences," 14 Sol. J. & Rep. 92.

² *Nulton v. Clayton*, 54 Iowa, 425; *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294.

³ *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294; *Dayton v. Borst*, 31 N. Y. 435. See *Lake Ontario, A. & N. Y. R. Co. v. Mason*, 16 N. Y. 451, n.; *Buffalo & N. Y. City R. Co. v. Dudley*, 14 N. Y. 336.

⁴ *Coppage v. Hutton*, (Ind. 1890) 24 N. E. Rep. 112. Cf. Ind. Rev. Stat. § 3851.

⁵ *Erie & N. Y. City R. Co. v. Owen*, 32 Barb. 616.

⁶ "Application for Shares," 12 Sol. J. & Rep. 172; *Pellatt's Case*, 2 Ch. 527; *Gunn's Case*, 3 Ch. 40. Notice to an agent of the company is not

notice to the allottee. *Hebb's Case*, 4 Eq. 9; *In re Peruvian Ry. Co.*, L. R. 4 Ch. 322; *Ward's Case*, L. R. 10 Eq. 659. *Contra*, *Burke v. Lechmere*, L. R. 6 Q. B. 297; *Thames Tunnel Co. v. Sheldon*, 6 Barn. & C. 341; *In re Peruvian Ry. Co.*, L. R. 4 Ch. 322, where it is said that if the applicant become cognizant of the fact of allotment by other means and has acted or permitted others to act upon the assumption of his being a share-owner, he is estopped to object that he received no notification of allotment.

⁷ *Dunlop v. Higgins*, 1 H. L. 381; *Harris' Case*, 7 Ch. 587.

⁸ *Harris' Case*, 7 Ch. 587; *Townsend's Case*, 13 Eq. 148; *Household Fire Co. v. Grant*, 48 L. J. Ex. 219; s. c. 4 Ex. Div. 216; *Steel's Case*, 28 W. R. 241. See, however, *British & American Telegraph Co. v. Colson*, L. R. 6 Ex. 108.

plication followed by allotment and communication of that allotment to the applicant. So that in a case where no allotment had been made since application, the only allotment which the directors had resolved on being before application, there was held to be no contract, and the allottee was considered entitled to have his name withdrawn from the register of shareholders.¹ The words in the Companies Clauses Act, "and whose name shall have been entered on the register of shareholders,"² are held to be descriptive merely and not to make registration a condition precedent to liability as a shareholder.³ The letter of allotment is required to be stamped.⁴ An application for shares may be withdrawn at any time prior to allotment.⁵

§ 515. Cash deposits.—A deposit in money to the amount of ten per cent. of the subscription is required to be made at the time of subscribing by the New York "Stock Corporation Law" of 1890.⁶ Similar requirements are found in the stat-

¹ *In re Northern Electric Wire & Cable Manuf. Co., Limited*, (Ch. Div. 1890) 8 Ry. & Corp. L. J. 177, *per Kay, J.* In this case, the proceedings on the part of the company having been grossly irregular, the allottee was entitled to have his deposit returned with interest at four per cent. *per annum* from the date of payment, and he was likewise held to be entitled to the costs of the application.

² 8 Vic. ch. 16, § 8.

³ *Wolverhampton &c. Co. v. Hawkesford*, 7 Com. B. N. S. 795, 814; *Portal v. Emmens*, 1 C. P. Div. 201, 664.

⁴ *In re Northern Electric Wire &c. Co.*, (Ch. Div. 1890) 8 Ry. & Corp. L. J. 177.

⁵ *In re Northern Electric Wire &c. Co.*, (Ch. Div. 1890) 8 Ry. & Corp. L. J. 177. In this case, on the 14th of August, H. verbally informed the managing director of the company that he intended to withdraw his application for shares, but

he was told that he must communicate with the company. H. did not, however, make any communication directly to the company, but wrote to the vendors and promoters of the company withdrawing his application for shares. On the 23d of August the secretary of the company forwarded to H. a letter of allotment of shares dated the 4th of July and duly stamped, to replace the notice sent to him previously, and asking him to pay the £1 per share due on allotment. Thereupon H. applied under section 35 of the Companies Act 1862 to have the register of members rectified by the removal of his name therefrom, and asking that the company might be ordered to repay the deposit of £80 paid by him upon his application for shares, which he had withdrawn, and interest thereon. *Acc. Wilson's Case*, 20 L. T. N. S. 962; *Ramsgate &c. Co. v. Montefiore*, L. R. 1 Ex. 109; *In re Bowron*, L. R. 5 Ex. 428.

⁶ N. Y. Laws of 1890, ch. 564, § 4.

utes of other States,¹ and in the New York acts of which the act of 1890 is a consolidation.² A promissory note, negotiated by the company and met by the subscriber at maturity, has been held equivalent to a cash payment.³ It is doubtful, however, whether a check can be regarded as "money" or "cash" within the meaning of these statutes.⁴ A subscription taken in violation of these statutory provisions can not be enforced by the corporation.⁵ The subscription and the payment of the ten per cent. must both concur to satisfy the requirements of the statute.⁶ A subscription unaccompanied by the required ten per cent. of the par value in cash is void.⁷ It has been said, however, that a subscription is not invalid because a short interval of time occurs between the actual signing of the subscription-book and the payment of the money;⁸ and it has also been held that the failure to pay the necessary percentage at the time of the subscription furnishes the subscriber with no defense, on the principle that no man will be permitted to take advantage of his own wrong.⁹ But in New York

¹ *E. g.*, Va. Code of 1873, ch. 57, § 3, requiring a deposit of two dollars; Note to Parker v. Thomas, 81 Am. Dec. 392, 397.

² N. Y. Laws of 1875, ch. 611; N. Y. Laws of 1850, ch. 140, § 4.

³ Ogdensburg &c. R. Co. v. Wooley, 3 Abb. App. Dec. 398. See also Vermont Central R. Co. v. Cloyes, 21 Vt. 39; s. c. 1 Am. R. Cas. 226. Cf. East New York &c. R. Co. v. Lighthall, 6 Robt. (N. Y.) 407.

⁴ In California payment may be by check. People v. Stockton &c. R. Co., 45 Cal. 306. The same has been held by the inferior courts in New York. *In re Staten Island Rapid Transit R. Co.*, 37 Hun, 422; Thorp v. Woodhull, 1 Sandf. Ch. 411. Cf. Comins v. Coe, 117 Mass. 45. But the New York court of appeals has held *contra*. Durant v. Abendroth, 69 N. Y. 148. Cf. Excelsior Grain Binder Co. v. Stayner, 25 Hun, 91; s. c. 61 How. Pr. 456; affirming s. c. 58 How. Pr. 273. In this case a sub-

scriber to the stock of a corporation organized under New York Laws 1875, ch. 611, paid ten per cent. of the amount of his subscription by check, but stopped payment of the check, so that the amount was never actually paid; and it was held that an action could not be maintained against him upon his subscription.

⁵ Excelsior Binder Co. v. Stayner, 25 Hun, 91; s. c. 61 How. Pr. 456; affirming s. c. 58 How. Pr. 273; Beach v. Smith, 30 N. Y. 116; Black River &c. R. Co. v. Clark, 25 N. Y. 208; Croker v. Crane, 21 Wend. 211.

⁶ Perry v. Hoadley, 19 Abb. N. C. 76.

⁷ Perry v. Hoadley, 19 Abb. N. C. 76.

⁸ Excelsior Grain Binder Co. v. Stayner, 25 Hun, 91; s. c. 61 How. Pr. 456; affirming s. c. 58 How. Pr. 273.

⁹ Vicksburgh, S. & T. R. Co. v. McKean, 12 La. Ann. 638; Henry v. Vermillion & A. R. Co., 17 Ohio,

and Pennsylvania a failure to comply with the requirement may be pleaded in defense to actions to enforce subscriptions.¹ A few cases in other States follow the New York and Pennsylvania rule.² In England the authorities are conflicting, but it is thought that the only effect of a failure to make the cash deposit is to restrict the subscriber's right to transfer his shares.³

187; *Swartwout v. Michigan &c. R. Co.*, 24 Mich. 389; *Lake Ontario &c. R. Co. v. Mason*, 16 N. Y. 451; *Illinois River R. Co. v. Zimmer*, 20 Ill. 654; *Oler v. Baltimore &c. R. Co.*, 41 Md. 588; *Pittsburgh &c. R. Co. v. Applegate*, 21 W. Va. 172; *Haywood &c. R. Co. v. Bryan*, 6 Jones L. (N. C.) 82; *Barrington v. Mississippi &c. R. Co.*, 32 Miss. 370; *Wright v. Shelby R. Co.*, 16 B. Mon. 4; *Minnesota &c. Ry. Co. v. Bassett*, 20 Minn. 535; *Mitchell v. Rome R. Co.*, 17 Ga. 574; *Spartanburg &c. R. Co. v. Ezell*, 14 S. C. 281; *Stuart v. Valley R. Co.*, 32 Gratt. 146; *Fiser v. Mississippi &c. R. Co.*, 32 Miss. 359; *Selma &c. R. Co. v. Roundtree*, 7 Ala. 670; *Chamberlain v. Painesville &c. R. Co.*, 15 Ohio St. 225; *Klein v. Alton &c. R. Co.*, 13 Ill. 514; *Ryder v. Alton &c. R. Co.*, 13 Ill. 516; *Ashtabula &c. R. Co. v. Smith*, 15 Ohio St. 328; "Subscriptions to the Capital Stock of Corporations," by James M. Kerr, (1889) 6 Ry. & Corp. L. J. 422. *Cf.* *People v. Stockton &c. R. Co.*, 45 Cal. 306; *McRea v. Russell*, 12 Ired. 224; *Vermont Central R. Co. v. Cloyes*, 21 Vt. 30; *Hall v. Selma &c. R. Co.*, 6 Ala. 741; *Greenville &c. R. Co. v. Woodsides*, 5 Rich. L. (S. C.) 145; *Blair v. Rutherford*, 31 Tex. 465; *Garrett v. Dillsburg &c. R. Co.*, 78 Pa. St. 465.

¹*Hibernia Turnpike Co. v. Henderson*, 8 Serg. & R. 219; s. c. 11 Am. Dec. 593; *Leighty v. Susquehanna &c. Turnpike Co.*, 14 Serg. & R. 434; *Boyd v. Peach Bottom Ry. Co.*, 90

Pa. St. 49; *New York &c. R. Co. v. Van Horn*, 57 N. Y. 473; *Jenkins v. Union Turnpike Co.*, 1 Caines' Cas. in Error, 86, reversing s. c. 1 Caines' Rep. 381; *Excelsior Grain Binder Co. v. Stayner*, 25 Hun. 91; *Stephens v. Fox*, 83 N. Y. 313, 316, 317; *Black River &c. R. Co. v. Clarke*, 25 N. Y. 208. *Cf.* *Rensselaer &c. Co. v. Barton*, 16 N. Y. 457, doubting *Jenkins v. Union Turnpike Co.*, 1 Caines' Cas. in Error, 86, *supra*; *Lake Ontario &c. R. Co. v. Mason*, 16 N. Y. 451; *Crocker v. Crane*, 21 Wend. 211; *Thorp v. Woodhull*, 1 Sand. Ch. 411; *Eastern Plank Road Co. v. Vaughan*, 14 N. Y. 546; *Highland Turnpike Co. v. McKean*, 11 Johns. 98; *Ogdensburgh &c. R. Co. v. Wooley*, 3 Abb. Ct. of App. 398; *Ogdensburgh &c. R. Co. v. Frost*, 21 Barb. 541. But only unconditional subscriptions, taken by commissioners after the incorporation of the company, may be thus impeached. *Hanover &c. R. Co. v. Haldeman*, 82 Pa. St. 36; *Garrett v. Dillsburg &c. R. Co.*, 78 Pa. St. 465; *Beach on Railways*, § 126; *Philadelphia &c. R. Co. v. Hickman*, 28 Pa. St. 318. *Cf.* *Butcher v. Dillsburg &c. R. Co.*, 76 Pa. St. 306.

²*People v. Chambers*, 42 Cal. 201; *Farmers' &c. Bank v. Nelson*, 12 Md. 35; *Taggart v. Western Maryland R. Co.*, 24 Md. 588; *Charlotte &c. R. Co. v. Blakeley*, 3 Strobb. Eq. 245; *Wood v. Coosa &c. R. Co.*, 32 Ga. 273.

³*Purdey's Case*, 16 W. R. 660; *East*

§ 516. Subscriptions to obtain charter.—Colorable or fictitious subscriptions,¹ subscriptions by persons having no reasonable expectation of being able to pay,² by persons under the disabilities of coverture and infancy;³ and subscriptions payable in a depreciated currency, are not to be counted as a part of the subscriptions required by the statute as a prerequisite to valid organization.⁴

§ 517. Subscriptions to obtain charter not to be conditional.—A condition that payment shall be in property or services, excludes a subscription from being counted among those taken for the purpose of obtaining the charter.⁵ The same is true of those made by contractors upon special terms.⁶ And generally, when a certain amount of stock is required by statute to be subscribed before the company shall become in-

Gloucestershire Ry. Co. v. Bartholomew, L. R. 3 Ex. 15; McEwen v. West London &c. Co., 6 Ch. 655. But see Eustace v. Dublin Trunk Ry. Co., 6 Eq. 182, and McElwraith v. Dublin Grand Trunk Ry. Co., 7 Ch. 134, holding that the allottee can not be compelled to take the shares.

¹ Memphis Branch R. Co. v. Sullivan, 57 Ga. 240.

² Holman v. State, 105 Ind. 569, holding that under a statute making it an essential prerequisite to the valid organization of a corporation that stock to a certain amount shall be subscribed, the subscriptions must have been made in good faith by persons having a reasonable expectation of being able to pay. *Acc.* Phillips v. Covington &c. Co., 2 Met. (Ky.) 219; Belfast &c. Ry. Co. v. Inhabitants of Brooks, 60 Me. 568; Lewey's Island R. Co. v. Bolton, 48 Me. 451; s. c. 77 Am. Dec. 236; Salem Mill Dam Corporation v. Ropes, 26 Mass. 187. As to whether or no a subscription may be avoided on the ground that the subscriptions of insolvents have been counted in estimating the full capital stock to have been subscribed, see Memphis

Branch R. Co. v. Sullivan, 57 Ga. 240; Fry v. Lexington &c. R. Co., 2 Met. (Ky.) 314; Dail v. Mt. Sterling Coal Road Co., 13 Bush, 32; Somerset R. Co. v. Clarke, 61 Me. 379; Oldtown &c. R. Co. v. Veazie, 39 Me. 571; Contoocook &c. R. Co. v. Barker, 32 N. H. 336; New Hampshire Central R. Co. v. Johnson, 30 N. H. 390; s. c. 64 Am. Dec. 300; Peoria &c. R. Co. v. Preston, 35 Iowa, 115.

³ Phillips v. Covington &c. Co., 2 Met. (Ky.) 219.

⁴ Cabot &c. Bridge v. Chapin, 6 Cush. 50.

⁵ Troy &c. R. Co. v. Newton, 74 Mass. 596; Oldtown &c. R. Co. v. Veazie, 39 Me. 571; New York &c. R. Co. v. Hunt, 39 Conn. 75. Ridgefield &c. R. Co. v. Brush, 43 Conn. 86, is not *contra*, as the agreement there to pay in work was parol and could not be allowed to vary an apparently absolute written contract of subscription. *Contra*, Phillips v. Covington &c. Co., 2 Met. (Ky.) 219.

⁶ Boston &c. R. Co. v. Wellington, 113 Mass. 79; Oskaloosa &c. Works v. Parkhurst, 54 Iowa, 357; Beach on Railways, § 108.

corporated, conditional subscriptions can not be reckoned,¹ unless it be shown that the conditions have been performed or have been waived.² Any other rule would lead to the procurement from the Commonwealth of valuable charters without any absolute capital for their support, and thus give rise to a system of speculation and fraud which would be intolerable.³ After incorporation, however, the company may receive conditional subscriptions.⁴ In New York subscriptions taken for the purpose of obtaining incorporation, are rendered void by being made conditionally;⁵ while in Pennsylvania the subscription itself is valid and binding, but the condition null and void.⁶

§ 518. Who may receive subscriptions.—It is essential to the validity of a subscription, that it be taken by a person authorized to receive it.⁷ The company is under no obligation to accept subscriptions taken by an unauthorized agent;⁸

¹ *Caley v. Philadelphia &c. R. Co.*, 80 Pa. St. 363; *Boston &c. R. Co. v. Wellington*, 113 Mass. 79; *Troy &c. R. Co. v. Newton*, 74 Mass. 596. *Cf.* *Brand v. Lawrenceville Branch R. Co.*, (1888) 77 Ga. 506.

² *Boston &c. R. Co. v. Wellington*, 113 Mass. 79; *Troy &c. R. Co. v. Newton*, 8 Gray, 569.

³ *Caley v. Philadelphia &c. R. Co.*, 80 Pa. St. 363.

⁴ *Caley v. Philadelphia &c. R. Co.*, 80 Pa. St. 363; *Pittsburgh &c. R. Co. v. Stewart*, 41 Pa. St. 54; *Union Hotel Co. v. Hersee*, 79 N. Y. 454. *Cf.* *Hanover Junction &c. R. Co. v. Haldeman*, 82 Pa. St. 36.

⁵ *Troy &c. R. Co. v. Tibbits*, 18 Barb. 297. See also *Putnam v. City of New Albany*, 4 Biss. 365, 383, where the United States court would seem to follow the New York rule.

⁶ *Boyd v. Peach Bottom Ry. Co.*, 90 Pa. St. 169; *Caley v. Philadelphia &c. R. Co.*, 80 Pa. St. 363; *Bedford R. Co. v. Bowser*, 48 Pa. St. 29; *Barrington v. Pittsburgh &c. R. Co.*, 44

Pa. St. 358; *Pittsburgh &c. R. Co. v. Biggar*, 34 Pa. St. 455; *Pittsburgh &c. R. Co. v. Woodrow*, 3 Phila. 271. *Cf.* *Legonier Valley R. Co. v. Williams*, 33 Leg. Intel. 40. See also *Burke v. Smith*, 16 Wall. 390, where the United States court would seem to follow the Pennsylvania rule.

⁷ *Walker v. Mobile &c. R. Co.*, 34 Miss. 245; *Essex Turnpike Corporation v. Collins*, 9 Mass. 292; *Carlisle v. Saginaw Val. & St. L. R. Co.*, 27 Mich. 315; *Shurtz v. Schoolcraft & T. R. Co.*, 9 Mich. 269; *Troy & B. R. Co. v. Warren*, 18 Barb. 310; *Grangers' Market Co. v. Vinson*, 6 Oregon, 174; *Northeastern R. Co. v. Rodrigues*, 10 Rich. (S. C.) 278; *Howard's Case*, 1. R. 1 Ch. App. 561.

⁸ *Walker v. Mobile &c. R. Co.*, 34 Miss. 245; *Taggart v. Western &c. R. Co.*, 24 Md. 563; *Mobile &c. R. Co. v. Yandal*, 5 Sneed, (Tenn.) 294; *Melvin v. Haitt*, 52 N. H. 61. Compare, as to acceptance of such subscriptions, *Mansfield &c. R. Co. v. Brown*, 26 Ohio St. 223, where it is

but, of course, if it ratify his act in receiving subscriptions, the contract will be then complete.¹ It has been questioned whether, when the statute provides for the taking of subscriptions by commissioners, those given to other persons will be binding; and there are some authorities which hold that they will not.² The better rule, however, seems to be that statutory provisions for commissioners are directory rather than mandatory, and that subscriptions taken by other persons, duly authorized, or whose acts are subsequently ratified, are valid and binding upon the parties.³ The New York "Stock Corporation Law" of 1890 provides that if the whole capital stock be not subscribed at the time of filing the certificate, the directors may continue to take subscriptions upon giving notice thereof.⁴ Persons taking subscriptions may incur personal liability by failing to deliver them to the company.⁵

§ 519. Commissioners.— Although the statute provide for subscriptions to be made through commissioners, those made in another way are not necessarily void.⁶ Commissioners appointed under a statute to take subscriptions and to make distribution and allotment of shares, in the performance of the former duty exercise a ministerial function; in the latter,

held that acceptance may be shown by parol.

¹ Walker v. Mobile &c. R. Co., 34 Mich. 245.

² Troy & B. R. Co. v. Tibbits, 18 Barb. 297; Field v. Cooks, 16 La. Ann. 153; Parker v. Northern Cent. M. R. Co., 33 Mich. 23; Unity Ins. Co. v. Cram, 43 N. H. 636.

³ Buffalo & J. R. Co. v. Gifford, 87 N. Y. 294. See also Buffalo & N. Y. City R. Co. v. Dudley, 14 N. Y. 336; Stuart v. Valley R. Co., 32 Gratt. 146; Webster v. Upton, 91 U. S. 65; Upton v. Tribilcock, 91 U. S. 45.

⁴ N. Y. Laws of 1890, ch. 564, § 41.

⁵ In People's Brewing Co. v. Boebinger, (1888) 40 La. Ann. 277, the defendants were sued to deliver a list containing subscriptions of various parties to eight hundred shares

of the stock of plaintiff corporation of the face value of fifty dollars per share, and, in default of delivery, for judgment condemning them to pay the value of the list. But it was held that their liability could not exceed an obligation to discharge the liabilities of the subscribers in accordance with the terms of their subscriptions, and that a judgment for \$40,000 cash, where the subscriptions were on credit, and without reserving their right to receive the stock subscribed for, was manifestly insupportable.

⁶ Buffalo &c. R. Co. v. Gifford, 87 N. Y. 294; Stuart v. Valley R. Co., 32 Gratt. 146. *Contra*, Troy &c. R. Co. v. Tibbits, 18 Barb. 297; Schurtz v. Schoolcraft &c. R. Co., 9 Mich. 269; and see Parker v. Northern &c. R. Co., 33 Mich. 23.

a judicial; and when acting judicially, it is essential that all of them be present, otherwise the distribution of shares is void.¹ While the organization of the company can not be effected until the commissioners have received subscriptions and allotted shares of the requisite amount for the beginning of operations,² they have only such general powers as are requisite to render valid the subscriptions made through them; and upon the organization of the corporation their powers and duties are terminated.³ The commissioners may themselves subscribe for the stock of the company,⁴ provided they allow themselves no priority. The books must be open, and the public must have an opportunity to subscribe. No subscription can be lawfully taken with closed doors.⁵ In Pennsylvania commissioners are held to have no authority to accept conditional subscriptions;⁶ while in other States conditions may be annexed to subscriptions whether made before commissioners or taken by agents of the company.⁷ But delivery of an escrow subscription to a commissioner will render the contract absolute.⁸ The fact that the commissioners did not take the oath prescribed by the statute does not invalidate subscriptions given to them, in other respects regular.⁹

§ 520. Limitation of the amount of a single subscription.

There is no rule at common law forbidding a single person to

¹ *Beach on Railways*, § 84; *Crocker v. Crane*, 21 Wend. 211; s. c. 34 Am. Dec. 228. In *Penobscot &c. R. Co. v. White*, 41 Me. 512; s. c. 66 Am. Dec. 257, a majority of the board of commissioners was declared to be a quorum for the transaction of business.

² *Walker v. Devereaux*, 4 Paige, 229.

³ *Walker v. Devereaux*, 4 Paige, 229; *Crocker v. Crane*, 21 Wend. 211; s. c. 34 Am. Dec. 228; *Peninsular &c. Co. v. Duncan*, 28 Mich. 130; *James v. Cincinnati &c. R. Co.*, 2 Disney, 261.

⁴ *Walker v. Devereaux*, 4 Paige, 229.

⁵ *Brower v. Passenger Ry. Co.*, 3 Phila. 161.

⁶ *Pittsburgh &c. R. Co. v. Biggers*, 34 Pa. St. 455; *Babington v. Pittsburgh &c. R. Co.*, 34 Pa. St. 15, 81; *Bedford R. Co. v. Bowser*, 48 Pa. St. 29. See, however, *Pittsburgh &c. R. Co. v. Stewart*, 41 Pa. St. 54.

⁷ *Evansville &c. R. Co. v. Shennor*, 10 Ind. 244; *New Albany &c. R. Co. v. McCormick*, 10 Ind. 499; *Martin v. Pensacola &c. R. Co.*, 8 Fla. 370.

⁸ *Wight v. Shelby R. Co.*, 16 B. Mon. 4. Cf. *Price v. Pittsburgh &c. R. Co.*, 34 Ill. 36.

⁹ *Hollman v. Williamsport &c. Co.*, 9 Gill & J. 462.

subscribe to the whole of a company's capital stock.¹ But statutory commissioners appointed to take subscriptions have authority, independent of any express provision in the statute, to limit the number of shares which a single subscriber may be allowed to take.² And when the number of shares which one person may take is limited by the incorporating act, no agreement between the subscriber and the company in respect of a greater number is enforceable.³

§ 521. **Subscriptions in excess of the capital stock.**—As a general rule subscriptions in excess of the amount limited as the capital stock of the corporation are void;⁴ and no liability thereon attaches to a subscriber to whom stock in excess of the amount authorized has been issued.⁵ A company frequently obtains subscriptions for stock beyond the limit fixed by its charter. But a suit to recover a defendant's subscription in such a case, can not be met with the defense that the taking of subscriptions beyond the prescribed amount releases him. If, however, he is a subscriber for the additional unauthorized shares, there can be no recovery against him; but being one of the earliest subscribers, and there being stock remaining not yet issued, he is liable.⁶ Under acts of incorporation making provision for the apportionment of the subscriptions, the contract of subscription is not complete until the apportionment has been made.⁷ Where subscriptions are taken by commissioners the act of incorporation often vests them with a discretion in the distribution of the shares, and in case of subscriptions in excess of the capital stock, they

¹King v. Barnes, (1888) 109 N. Y. 267, where it was decided that an agreement to organize a corporation, and that one of the persons furnishing the capital should subscribe for the whole stock intended to be taken by the associates, was not illegal nor void as against public policy.

²Brown v. Passenger Ry. Co., 3 Phila. 161; Perkins v. Savage, 15 Wend. 412.

³Simpson v. Greenfield Build. Assoc. (1882) 38 Ohio St. 349, which was decided under the Ohio Act of May 9, 1868.

⁴Burrows v. Smith, (1853) 10 N. Y. 550; Lathrop v. Kneeland, 46 Barb. 432; Oler v. Baltimore &c. R. Co., (1874) 41 Md. 583.

⁵Clark v. Turner, 73 Ga. 1.

⁶Oler v. Baltimore &c. R. Co., (1874) 41 Md. 583; distinguishing McCord v. Ohio &c. R. Co., 13 Ind. 221.

⁷Burrows v. Smith, (1853) 10 N. Y. 550; Crocker v. Crane, 21 Wend. 211; s. c. 34 Am. Dec. 228; Walker v. Devereaux, 4 Paige, 229. Cf. Buffalo &c. R. Co. v. Dudley, (1856) 14 N. Y. 336, 346.

may allot to each subscriber such a proportion of the whole capital stock as the amount of his subscription bears to the whole amount subscribed, and no subscription will then be entirely void.¹ Equity will grant relief against the failure of the commissioners to make a proper apportionment.² Where a person subscribes to a certain proposed increase of stock of a national bank, and pays his subscription, he is bound thereby, though the bank, under the provisions of its by-laws to determine what disposition shall be made of the privilege of subscribing for the new stock when it has not all been subscribed for within the time given in its notice, limits the amount of the increase to the amount paid in.³ But in the absence of an express statutory authority, the commissioners have no implied power to apportion an excess of subscriptions.⁴ Where the whole amount of the corporate stock has been issued and the corporation becomes liable, either to issue certain certificates to a subscriber or to pay him damages, the court having no authority to direct such an issue, can only give judgment that the corporation pay damages.⁵ For the courts have no power by mandate or decree, or in any other manner, to effect an increase or reduction of the capital stock.⁶ Under these circumstances, specific performance is impossible.⁷ But in Massachusetts the rule prevails that the corporation may be compelled to issue the stock, and, to prevent an illegal over-issue, it must purchase an equal amount of shares in the market.⁸

¹ *Buffalo &c. R. Co. v. Dudley, Manuf. Co.*, 3 Md. Ch. 418; *Smith v. (1856)* 14 N. Y. 336. Cf. *Danbury &c. North American Mining Co.*, 1 Nev. R. Co. v. Wilson, (1860) 22 Conn. 435, 423.

454.

² *Walker v. Devereaux*, 4 Paige, 229.

³ *Aspinwall v. Butler*, (1890) 133 U. S. 595.

⁴ *Van Dyke v. Stout*, 8 N. J. Eq. 333. Cf. *Crocker v. Crane*, 21 Wend. 211; s. c. 34 Am. Dec. 228.

⁵ *People v. Parker Vein &c. Co.*, 10 How. Pr. 551; *Finley Shoe &c. Co. v. Kurtz*, 34 Mich. 89; *Mechanics' Bank v. New York &c. R. Co.*, 13 N. Y. 599; *Williams v. Savage* § 116.

⁶ *Williams v. Savage Manuf. Co.*, 3 Md. Ch. 418; *Baker v. Wasson*, 59 Tex. 140; *Smith v. North American &c. Co.*, 1 Nev. 423; 2 *Morawetz on Corporations*, § 683.

⁷ *Finley Shoe &c. Co. v. Kurtz*, 34 Mich. 89.

⁸ *Boston &c. Co. v. Richardson*, 135 Mass. 473; *Machinists' Nat. Bank v. Field*, 126 Mass. 345; *Pratt v. Taunton &c. Co.*, 123 Mass. 110; *Lowell on the Transfer of Stocks*, § 116.

§ 522. Competency to subscribe—(a) Natural and artificial persons.—All natural persons capable of making a valid contract may subscribe to the capital stock of a corporation.¹ It is contrary to the policy of the common law, however,² and to the spirit of modern legislation that one corporation should participate in the management of another except under restrictions which are deemed necessary to protect the masses from dangers said to be incident to harmonious relations between persons controlling large aggregations of capital.³ Accordingly, a corporation can not become a stockholder in another corporation, unless that power be given it by its charter or be necessarily implied therein.⁴ Especially is an

¹ *Vide supra*, § 61; *Sims v. Street R. Co.*, 37 Ohio, 556; s. c. 4, Am. & Eng. R. Cas. 132. The capacity of a married woman to take, hold and transfer shares of stock is governed by the law of her domicile. *Hill v. Pine River Bank*, 45 N. H. 300. As to the husband's right to transfer stock standing in the name of his wife, see: *Stanwood v. Stanwood*, 17 Mass. 57; *Arnold v. Ruggles*, 1 R. I. 165; *Stamford Bank v. Ferris*, 17 Conn. 259; *Curtis v. Stever*, 36 N. J. L. 304; *Dow v. Gould & Co.*, 31 Cal. 629; *Slaymaker v. Bank of Gettysburg*, 10 Pa. St. 373; *Cornell's Case*, 18 Week. Notes Cas. 289; *Wall v. Tomlinson*, 16 Ves. 413; *Wildman v. Wildman*, 9 Ves. 174; *Cochran v. Chambers*, Ambl. 79, note.

² *Vide supra*, §§ 393, 394.

³ Thus under the recent codification of the law of corporations by the legislature of New York, it is enacted: "No corporation shall use any of its funds in the purchase of any stock of its own or any other corporation unless the same shall have been *bona fide* pledged, hypothecated or transferred to it, by way of security for, or in satisfaction or part satisfaction of a debt previously contracted in the course of

its business, or shall be purchased by it at sale upon judgments, orders or decrees which shall be obtained for such debts, or in prosecution thereof. N. Y. Laws of 1890, ch. 564, § 40. "But any domestic corporation, transacting business in this State and also in other States or foreign countries, may invest its funds in the stocks, bonds or securities of other corporations, owning lands in this State or such States, if dividends have been paid on such stocks continuously for three years immediately before such loans are made, or if the interest on such bonds or securities is not in default; and such stock, bonds or securities shall be continuously of a market value twenty per cent. greater than the amount loaned (sic.) or continued (sic.) thereon." N. Y. Laws of 1890, ch. 564, § 40.

⁴ *Pearson v. Concord R. Co.*, (1883) 62 N. H. 537; s. c. 13 Am. St. Rep. 590, citing *Franklin County v. Lewiston Bank*, 68 Me. 43; s. c. 28 Am. Rep. 9; *Mechanics' & Co. Bank v. Meriden Agency Co.*, 24 Conn. 159; *Green's Brice's Ultra Vires*, 91; *Morawetz on Corporations*, § 229. Cf. "Contracts by Corporations to Take Shares," 17 Sol. J. & Rep. 362, 383, 422 (three articles).

acquisition of stock with a view to controlling or affecting the management of the other corporation, obnoxious to the spirit of the common and statutory law.¹ Certain classes of corporations, such as those organized for religious and charitable and literary purposes, may legally invest their moneys in the stock of other corporations. The power if not expressly mentioned in their charters is necessarily implied, for the preservation of the funds with which institutions of that character are endowed, and to render their funds productive.² So an insurance company, or savings bank, may rightfully invest its capital or deposits in the stocks of railroad companies, banks, manufacturing companies and similar corporations. The power so to do is necessary to enable them to engage in the business for which they are organized, and, hence, is implied, if not expressly granted, in their charters.³ On the other hand, manufacturing or railroad corporations being incorporated for the purpose of manufacturing or transporting passengers and merchandise, investing their funds in that of other corporations is not in the line of their business.⁴ Under extraordinary circumstances, it may become necessary for a national bank or a manufacturing or railway company to acquire stock in another corporation, as in satisfaction of a valid debt or by way of security, but with a view to its subsequent sale or conversion into money, so as to make good or redeem an anticipated loss.⁵ This necessity is recognized in the New

¹ *Pearson v. Concord R. Co.*, (1883) 62 N. H. 537; s. c. 13 Am. St. Rep. 590, 603; *Sumner v. Marcy*, 3 Wood. & M. 105; *Central R. Co. v. Collins*, 40 Ga. 582; *Hazelhurst v. Savannah &c. R. Co.*, 43 Ga. 13; *Great Northern Ry. Co. v. Eastern &c. Ry. Co.*, 21 L. J. Ch. 837; *Booth v. Robinson*, 55 Md. 419, 439. Dealing in stocks is not expressly prohibited in the act of congress providing for the organization of national banks (U. S. Rev. Stat. § 5136, subd. 7); but it is held that a prohibition thereof is implied from the failure to grant the power. *First National Bank v. National Ex. Bank*, 92 U. S. 122, 128.

² *Smith, J.*, in *Pearson v. Concord R. Co.*, (1883) 62 N. H. 537; s. c. 13 Am. St. Rep. 590, 603.

³ *Smith, J.*, in *Pearson v. Concord R. Co.*, (1883) 62 N. H. 537; s. c. 13 Am. St. Rep. 590, 603, 604.

⁴ *Smith, J.*, in *Pearson v. Concord R. Co.*, (1883) 62 N. H. 537.

⁵ *First National Bank v. National Ex. Bank*, 92 U. S. 128; *Fleckner v. Bank of the United States*, 8 Wheat. 351; *Hodges v. New England Screw Co.*, 1 R. I. 312; s. c. 53 Am. Dec. 624, where the court said there was no doubt the defendant company might have taken stock in an iron company in payment for its rolling-mill, if it had been taken with a

York statute cited above.¹ But a railway company "can no more make a permanent investment of funds in the stock of another road than it can engage in general banking, manufacturing, or steamboat business. It is neither incidental to the purposes of its incorporation nor necessary in the exercise of the powers conferred by its charter."² The purchase by a corporation of stock in another corporation will be enjoined at the instance of stockholders when it involves a misapplication of corporate funds, or is a mere speculation, or is induced by a vicious purpose.³ But of course there is no rule to prevent a controlling stockholder in one corporation from purchasing a controlling interest in another.⁴

§ 523. (b) **Municipal corporations.**—A municipal corporation has no inherent power to make contracts of subscription to the stock of any private company.⁵ Its authority to do so is entirely dependent upon legislative grant,⁶ expressly given to the municipality itself either in its charter or in a special

view to selling again and not to holding it permanently.

¹ *Vide supra*, p. 841, n. 3.

² *Pearson v. Concord R. Co.*, (1883) 62 N. H. 537; s. c. 13 Am. St. Rep. 590, 604. Neither can a railway company indirectly through its agents subscribe for the stock of another railway. *Pearson v. Concord R. Co.*, 62 N. H. 537; s. c. 13 Am. St. Rep. 590.

³ *Pearson v. Concord R. Co.*, (1883) 62 N. H. 547; s. c. 13 Am. St. Rep. 590, 605, citing *Pierce on Railroads*, 505.

⁴ *Havemeyer v. Havemeyer*, 86 N. Y. 618; s. c. 45 N. Y. Super. Ct. Rep. 464; s. c. 43 N. Y. Super. Ct. Rep. 506; *O'Brien v. Breitenbach*, 1 Hilt. 304.

⁵ *Dillon on Municipal Corporations*, § 161; *Weightman v. Clark*, 103 U. S. 251. *Cf. Northern Bank v. Porter Township*, 110 U. S. 608.

⁶ *City of Jonesboro v. Cairo & C. R. Co.*, 110 U. S. 192; *Wells v. Supervisors*, 102 U. S. 625; *East Oakland v. Skinner*, 94 U. S. 255; *Kenicott v.*

Supervisors, 16 Wall. 452; *Thompson v. Lee County*, 3 Wall. 327; *Gelpecke v. Dubuque*, 1 Wall. 220; *Brodie v. McCable*, 33 Ark. 690; *City of Lynchburg v. Slaughter*, 75 Va. 57; *Pennsylvania R. Co. v. Philadelphia*, 47 Pa. St. 189; *Louisville & C. R. Co. v. Fairfield*, 51 Vt. 257; *Barnes v. Lacon*, 84 Ill. 461; *Campbell v. Paris & C. R. Co.*, 71 Ill. 611; *Taylor on Corporations*, § 319; *Wood's Ry. Law*, § 100. Under Const. Mo. 1865, art. xi, § 14, prohibiting the legislature to authorize a municipal corporation to become a stockholder in, or lend its credit to a corporation, without the assent of two-thirds of the qualified voters at a general or special election, such a vote, under legislative authority (Gen. Stat. Mo. § 338) to subscribe to the stock of a railroad company, will authorize a subscription, but will not validate the issue of negotiable bonds in payment therefor. *Hill v. City of Memphis*, (1890) 10 Sup. Ct. Rep. 562.

enabling act,¹ and the constitutionality of the enabling act will depend upon the nature of the business which the company is organized to conduct, upon its being in some way dedicated to a public use, either wholly or in part.²

§ 524. **Municipal subscriptions.**—It has not been without considerable doubt, however, that the weight of authority has finally established that, in the absence of any express constitutional prohibition, the legislature may confer this power upon municipal corporations in respect of enterprises not of a wholly governmental or strictly public character.³ To the

¹Beach on Railways, § 190, citing *Pitzman v. Freeburg*, 92 Ill. 111; *Sharpless v. Mayor*, 21 Pa. St. 147; s. c. 59 Am. Dec. 759; *Lewis v. City of Shreveport*, 108 U. S. 282; *Ottawa v. Carey*, 108 U. S. 110; *Allen v. Louisiana*, 103 U. S. 80; *Marsh v. Fulton*, 10 Wall. 676; *Commercial Bank v. Iola*, 2 Dillon, 353; *Welch v. Post*, 99 Ill. 471; *Leavenworth County v. Miller*, 7 Kan. 479; *La Fayette v. Cox*, 5 Ind. 38; *Dillon on Munic. Corp.*, § 161; *Wood's Ry. Law*, § 100. Ga. Act of Nov. 7, 1889, enacting that the railroad therein named, if its route is located within five miles of the town of T., shall run into that town, provided that the excess of the cost of the route through T. over the route proposed by the company shall be paid "by the town of T. or the citizens thereof," was construed to mean that the requisite amount was to be raised voluntarily by the people of the town, and not furnished by the corporation out of the public revenue. *Macon & B. R. Co. v. Stamps*, (Ga. 1890) 11 S. E. Rep. 442. But see *Bard v. City of Augusta*, 30 Fed. Rep. 906; *Copes v. Charleston*, 10 Rich. 491; *City Council v. Baptist Church*, 4 Strob. 306; *Burr v. Charenton County*, 2 McCrary, 603.

²*Cole v. La Grange*, 113 U. S. 1; *Bard v. City of Augusta*, 30 Fed.

Rep. 906; *Bloodgood v. Mohawk &c. R. Co.*, 18 Wend. 965; *McKenzie v. Wooley*, (1887) 39 La. Ann. 944; *Union Pacific R. Co. v. Smith*, 23 Kan. 745; *Weismer v. Village of Douglass*, 64 N. Y. 91. Cf. *Turner v. Commissioners*, 27 Kan. 314; *Amoskeag Nat. Bank v. Town of Ottawa*, 105 U. S. 866; *Gilson v. Town of Dayton*, 123 U. S. 59.

³Beach on Railways, § 187, citing, on the one hand, as contending against the constitutionality of such grants, two of the most eminent of American commentators, (*Dillon on Municipal Corporations*, §§ 12, 17, 153; *Cooley on Constitutional Limitations*, 261, 266) supported by the decisions of the Supreme Court of New York, (*People v. Henshaw*, 61 Barb. 409; *Sweet v. Hurlburt*, 51 Barb. 312; *Grant v. Coorter*, 24 Barb. 234; *Benson v. Albany*, 24 Barb. 248; *Ex parte Taxpayers of Kingston*, 40 How. Pr. 444. Cf. *Clarke v. Rochester*, 28 N. Y. 605) a line of cases in Iowa extending from 1858 to 1862, (*Stokes v. Scott*, 10 Iowa, 166; *State v. Wapello*, 13 Iowa, 388; *Myers v. Johnson*, 14 Iowa, 47) and an unbroken line of cases in Michigan. *People v. Detroit*, 28 Mich. 228; *Thomas v. Port Hudson*, 27 Mich. 320; *Bay City v. State Treasurer*, 23 Mich. 499; *People v. Salem*, 20 Mich. 452. On the other hand, sustaining

validity of a municipal subscription it is essential that the requirements of the State constitution and of the enabling act

the constitutionality of the grants, are the decisions of the New York Court of Appeals, (*Lyons v. Chamberlain*, 86 N. Y. 576; *Horton v. Thompson*, 71 N. Y. 513; affirmed, 101 U. S. 665; *Duanesburgh v. Jenkins*, 66 N. Y. 129; *People v. Spencer*, 55 N. Y. 1; *People v. Batchellor*, 53 N. Y. 128; *People v. Mitchell*, 35 N. Y. 551; *Starin v. Genoa*, 23 N. Y. 439; *Bank v. Rome*, 18 N. Y. 38) the decisions in Iowa prior to 1858 and since 1869, (*Dubuque v. Dubuque &c. R. Co.*, 4 Greene, 1, (1853); *State v. Bissell*, 4 Greene, 328, (1854); *Clapp v. Cedar County*, 5 Iowa, 15, (1857); s. c. 68 Am. Dec. 678; *McMillen v. Lee County*, 6 Iowa, 391, (1858); *Stewart v. Polk County*, 30 Iowa, 9, (1870); *McGregor v. Birdsall*, 32 Iowa, 149; *Jordan v. Hayne*, 36 Iowa, 9; *Muscantine R. Co. v. Horton*, 38 Iowa, 33; *Wappello v. Burlington &c. R. Co.*, 44 Iowa, 585) the decisions of the federal Supreme Court, (*Knox County v. Aspinwall*, 21 How. 539; *Dixon County v. Field*, 111 U. S. 83; *Lewis v. Barbour County*, 105 U. S. 739; *Taylor v. Ypsilanti*, 105 U. S. 60; *Clay County v. Society for Savings*, 104 U. S. 579; *Hickory v. Ellery*, 103 U. S. 423; *Rock Creek v. Strong*, 99 U. S. 271; *Railroad v. County of Otoe*, 16 Wall. 667; *Kenosha v. Lamson*, 9 Wall. 477; *Beloit v. Morgan*, 7 Wall. 619; *Lee County v. Rogers*, 7 Wall. 181; *Supervisors v. Schenck*, 5 Wall. 772; *Campbell v. Kenosha*, 5 Wall. 194; *Von Hoffman v. Quincy*, 4 Wall. 535; *Mitchell v. Burlington*, 4 Wall. 270; *Rogers v. Burlington*, 3 Wall. 654; *Thompson v. Lee County*, 3 Wall. 327; *Havemeyer v. Iowa County*, 3 Wall. 294; *Van Hastrup v. Madison*, 1 Wall. 291; *Seybert v. Pittsburgh*, 1 Wall. 273; *Mercer County v. Hackett*, 1 Wall. 81; *Gelpcke v. Dubuque*, 1 Wall. 175; *Curtis v. Butler County*, 24 How. 435; *Amey v. Mayor*, 24 How. 365. 376; *Zabriskie v. Railroad Co.*, 23 How. 381) of the federal circuit and district courts, (*Sibley v. Mobile*, 3 Woods, 535; *United States v. New Orleans*, 2 Woods, 230; *Long v. New London*, 9 Biss. 539) and the decisions of the courts of last resort in all the other States. *In Virginia*: *Goddin v. Crump*, 8 Leigh, 120. *In West Virginia*: *Goshorn v. County*, 1 W. Va. 308; *Allison v. Versailles R. Co.*, 10 Bush, 1. *In Kentucky*: *Maddox v. Graham*, 2 Met. (Ky.) 56; *Shelby County v. Cumberland &c. R. Co.*, 8 Bush, 209; *Slack v. Maysville &c. R. Co.*, 13 B. Mon. 1; *Talbot v. Dent*, 9 B. Mon. 526. *In Missouri*: *State v. Greene County*, 54 Mo. 540; *Smith v. Clark County*, 54 Mo. 58; *Osage Valley &c. R. Co. v. Morgan County*, 53 Mo. 156; *State v. Sullivan County*, 51 Mo. 522; *State v. Linn County*, 44 Mo. 504. *In North Carolina*: *Wood v. Commissioners of Oxford*, (1887) 97 N. C. 227; *Hill v. Commissioners*, 67 N. C. 367; *Taylor v. Newbern*, 2 Jones Eq. 141. *In Tennessee*: *Winston v. Tennessee &c. R. Co.*, 57 Tenn. 60; *Taxpayers v. Tennessee &c. R. Co.*, 11 Tenn. 329. *In Arkansas*: *Jacksonport v. Watson*, 33 Ark. 704; *Mississippi &c. R. Co. v. Camden*, 23 Ark. 300; *English v. Chicot Co.*, 26 Ark. 455. *In South Carolina*: *Copes v. Charleston*, 10 Rich. 136. *In Georgia*: *Powers v. Superior Ct. of Dougherty County*, 23 Ga. 65; *Winn v. Macon*, 21 Ga. 275. *In Alabama*: *Opelika v. Daniel*, 59 Ala. 211; *Gibbons v. Mobile &c. R. Co.*, 36 Ala. 410; *Stein v. Mayor*, 24 Ala. 591. *In Missis-*

be strictly complied with,¹ except, according to the general rule of statutory construction, as to mere directory provis-

sippi: New Orleans &c. R. Co. v. McDonald, 53 Miss. 240; Strickland v. Railroad Co., 27 Miss. 209. *In Florida*: Cotton v. Leon County, 6 Fla. 610. *In Texas*: San Antonio v. Gould, 34 Tex. 49; San Antonio v. Lane, 32 Tex. 405; San Antonio v. Jones, 28 Tex. 19. *In Louisiana*: Parker v. Scroggin, 11 La. Ann. 629; Police Jury v. McDonough, 8 La. Ann. 341. *In Pennsylvania*: Sharpless v. Mayor, 21 Pa. St. 147; s. c. 59 Am. Dec. 759; County v. Brinton, 47 Pa. St. 367; Commonwealth v. McWilliams, 11 Pa. St. 61. *In Massachusetts*: Supervisors v. Wisconsin &c. R. Co., 121 Mass. 460. *In Maine*: Stevens v. Anson, 73 Me. 489; Augusta Bank v. Augusta, 49 Me. 507. *In Vermont*: Bennington v. Park, 50 Vt. 178; National Bank v. Concord, 50 Vt. 257. *In New Hampshire*: Perry v. Kean, 56 N. H. 514. *In Connecticut*: Douglass v. Chatham, 41 Conn. 211; Bridgeport v. Housatonic R. Co., 15 Conn. 475. *In California*: Stockton &c. R. Co. v. Stockton, 41 Cal. 147; Napa Valley R. Co. v. Napa County, 30 Cal. 435; People v. Coon, 25 Cal. 635; Robinson v. Bidwell, 22 Cal. 379. *In Colorado*: People v. Pueblo County, 2 Col. 360. *In Illinois*: Chicago &c. R. Co. v. Aurora, 99 Ill. 205; Quincy &c. R. Co. v. Morris, 84 Ill. 410; Shaw v. Dennis, 5 Gilm. 405. But one of the "separate articles" of the Illinois constitution forbidding municipal corporations from subscribing for railroad stock having gone into effect July 2, 1870, municipal bonds issued for railway stock, pursuant to a vote taken after that date, are void. Casey v. People, (Ill. 1890) 24 N. E. Rep. 570. *In Indiana*: Reed v. Millikan, 79 Ind. 86; Brocaw v. Gib-

son County, 73 Ind. 548; City of Aurora v. West, 9 Ind. 74. *In Kansas*: Leavenworth County v. Miller, 7 Kan. 479; Leavenworth &c. R. Co. v. Douglass County, 18 Kan. 169; City of Atchison v. Butcher, 3 Kan. 104. *In Minnesota*: State v. Clark, 23 Minn. 423; Davidson v. Ramsey County, 18 Minn. 482. *In Nebraska*: Reinman v. Covington &c. R. Co., 7 Neb. 310; Hallenbeck v. Hahn, 2 Neb. 377. *In Nevada*: Gibson v. Mason, 5 Nev. 283. *In Ohio*: Walker v. Cincinnati, 21 Ohio St. 14; Cincinnati &c. R. Co. v. Clinton County, 1 Ohio St. 77. *In Wisconsin*: Lawson v. Milwaukee &c. R. Co., 36 Wis. 383; s. c. 30 Wis. 597; Clark v. Janesville, 10 Wis. 136.

¹ Beach on Railways, § 192. Thus Mo. Act of March 24, 1868, providing for the funding of their debts by incorporated towns, and empowering them to issue their bonds in payment of their past or future subscription to the stock of a railroad company, but providing for no vote as a prerequisite to the issue, is in contravention of Mo. Const. 1865, art. xi, § 14, prohibiting legislative authority to a municipal corporation to lend its credit to a corporation, without the assent of two-thirds of the qualified voters. Hill v. City of Memphis, (1890) 10 Sup. Ct. Rep. 562. So again it was held in a recent case in Kansas that where an election is ordered in a county under Kan. Laws of 1876, ch. 107, and the amendments thereto, including Laws of 1877, ch. 142, for the purpose of authorizing the county to subscribe to the capital stock of a railroad company, and to issue the bonds of the county in payment for stock, and the election is ordered

ions respecting matters of form.¹ But the purchaser of municipal bonds issued to a railway company is not bound to go behind the return of the board of supervisors to inquire whether all the steps necessary to their validity have been taken.²

§ 525. **Municipal subscriptions may be conditional.**—A municipal subscription may be made conditionally.³ Thus where a town is authorized to subscribe for railroad stock, and to issue bonds in payment therefor, the fact that the bonds are issued upon condition that the road should build its shops in that town, does not invalidate the bonds, since the impos-

upon a petition presented to the county board, which does not contain the names and is not the petition of two-fifths of the resident taxpayers of the county, as required by those laws, but the county board declares it to be sufficient, and the election is held, the returns canvassed, and the result declared in favor of subscribing for the stock and issuing the bonds, and the county clerk ordered by the county board to make the subscription does so, the election must be deemed to be void, because of the want of a sufficient petition. *Chicago, K. & W. R. Co. v. Harris*, (Kan. 1890) 23 Pac. Rep. 1064. And under Ky. Act of March 17, 1870, declaring that if more than one question of taxation is voted on at any one election the tax shall be void, an election upon county subscriptions to the capital stock of two different railroad companies, at the same time, is void, and is not validated as to one of the subscriptions by the fact that it is void as to the other. *Christian County Court v. Smith*, (Ky. 1890) 13 S. W. Rep. 276.

¹ Beach on Railways, § 193.

² On a question as to the validity of certain bonds issued by a county to a railway company, it was claimed

that the issue was not authorized by two-thirds of the qualified voters, as required by Const. Miss. art. xii, § 14, and that the fact would appear from an inspection of the registration lists. The board of supervisors, in the performance of their duties, had declared that two-thirds of the voters had voted for the measure. And it was held that a purchaser was not required to go behind the returns, and one who purchased for value, without actual notice of the wrongfulness thereof, was entitled to recover. *Madison County v. Brown*, (Miss. 1890) 7 So. Rep. 516.

³ *Casey v. People*, (Ill. 1890) 24 N. E. Rep. 570; *Town of Platteville v. Galena &c. R. Co.*, 43 Wis. 493; *Portland &c. R. Co. v. Inhabitants of Hartford*, 58 Me. 23; *Atchison &c. R. Co. v. Phillips County*, 25 Kan. 261; *Brokaw v. Gibson*, 73 Ind. 543; *Chicago &c. R. Co. v. Aurora*, 99 Ill. 205; *Noesen v. Port Washington*, 37 Wis. 168; *Perkins v. Port Washington*, 37 Wis. 177; *Vicksburgh v. Ouchita*, 11 La. Ann. 649; *Foot v. Mt. Pleasant*, 1 McCrary, 101; *People v. Hutton*, 18 Hun, 206; *Missouri Pacific R. Co. v. Tygard*, 84 Mo. 263; *s. c.* 54 Am. Rep. 97; *Jacks v. Helena*, 41 Ark. 213.

ing of the condition does not change the object for which the bonds were issued.¹ A writ of *mandamus* will not issue to compel municipal officers to issue bonds in payment of a subscription conditionally made, until the condition has been complied with by the company.² So long as any condition remains unfulfilled by the company, or any discretionary act is to be performed by the municipal officers, neither the vote of the electors nor the order of the municipal officers becomes operative; but when the officers are merely to perform a simple ministerial or clerical duty, the vote or order is in itself the subscription, and *mandamus* lies to compel the performance of the ministerial duties requisite to the formal execution of the contract.³

§ 526. Municipal subscriptions as affected by consolidation.—A new consolidated company succeeds to the rights of either constituent company in respect of any municipal aid which it may be entitled under its charter to have voted to it; and if the bonds were voted prior to the consolidation to one of the old companies, the new company will be entitled to have them issued to it.⁴ The enabling act is regarded as conferring a privilege upon the original corporation which is not lost by its merger in the new.⁵ But a vote of the electors

¹ Casey v. People, (Ill. 1890) 24 N. E. Rep. 570.

² State v. Minneapolis, 32 Minn. 501.

³ Wood's Ry. Law, § 117, citing People v. Pueblo County, 2 Cal. 360; Cumberland &c. R. Co. v. Barren County, 10 Bush, 604.

⁴ State v. Greene County, 54 Mo. 540; Henry County v. Nicolai, 95 U. S. 617; East Lincoln v. Davenport, 94 U. S. 801; Calloway County v. Foster, 93 U. S. 567; Scotland County v. Thomas, 94 U. S. 682; Smith v. Clark County, 54 Mo. 294; Washburn v. Cass County, 3 Dill. 251; Nugent v. Supervisors, 19 Wall. 241; Atchison &c. R. Co. v. Phillips County, 25 Kan. 261; Chicaming v. Carpenter, 106 U. S. 663; New Buf-

falo v. Iron Co., 105 U. S. 73; Niantic Savings Bank v. Douglass, 5 Ill. App. 579.

⁵ Scotland County v. Thomas, 94 U. S. 682; Smith v. Clarke County, 54 Mo. 58; Hannibal &c. R. Co. v. Marion County, 36 Mo. 294; Lewis v. Clarendon, 6 Reporter, 609; Harter v. Kernochan, 103 U. S. 562; County of Tipton v. Locomotive Works, 103 U. S. 523; Menasha v. Hazard, 102 U. S. 81; County of Cass v. Gillét, 100 U. S. 585; Wilson v. Salamanca, 99 U. S. 499; County of Schuyler v. Thomas, 98 U. S. 169; Henry County v. Nicolai, 95 U. S. 619; Town of East Lincoln v. Davenport, 94 U. S. 801. *Contra*, Harshman v. Bates County, 92 U. S. 569.

to take stock in a railway company prior to its consolidation with another, does not authorize the municipal officers to subscribe to the stock of the consolidated company.¹ Thus where a township has authorized the county court to make a subscription in its behalf, and the subscription has not been made at the time of the consolidation, the consolidation revokes the power, and a subscription thereafter will be invalid without a new power.² Dissenting tax-payers may generally object to the payment, if the consolidation materially alters the plan of the enterprise to which the aid was originally voted; and they are not estopped by any consent or acquiescence therein by the municipal authorities.³ But this is not the case if the consolidation was made under authority existing at the time the vote in favor of subscription was taken.⁴

§ 527. **Fraud in procuring subscriptions.**—A contract of subscription to the capital stock of a corporation procured through fraud can not be enforced against the subscriber.⁵ Such a subscription, however, is valid until disaffirmed,⁶ but the party must act promptly in disaffirming the contract after the knowledge of the fraud is brought home to him in order to secure relief.⁷ A subscriber to the stock of a corporation

¹ *Harshman v. Bates*, (1874) 3 Dill. 150.

² *Harshman v. Bates County*, 92 U. S. 569.

³ *McMahan v. Morrison*, 16 Ind. 172; s. c. 79 Am. Dec. 418; *Clearwater v. Meredith*, 1 Wall. 40; *State v. Nehama County*, 10 Kan. 569.

⁴ *Mansfield &c. R. Co. v. Brown*, 26 Ohio St. 223; *Sparrow v. Evansville &c. R. Co.*, 7 Ind. 369.

⁵ *New Orleans, O. & G. W. R. Co. v. Williams*, 16 La. Ann. 315; *Hester v. Memphis & C. R. Co.*, 32 Miss. 378; *Upton v. Tribilcock*, 91 U. S. 45; *Burnes v. Pennell*, 2 H. L. Cas. 497; *Atkinson v. Pocock*, 12 Jur. 60; *Reese v. Rover S. M. Co. v. Smith*, L. R. 4 H. L. 641; *Vreeland v. New Jersey Stone Co.*, 29 N. J. Eq. 118; "Effect of Fraud on Subscriptions to Stock," by Seymour D.

Thompson, 14 Am. L. Rev. 177; note to *Parker v. Thomas*, 81 Am. Dec. 392, 401; *Central Ry. Co. v. Kisch*, L. R. 2 H. L. 99; *Hayman v. European Central Ry. Co.*, 7 Eq. 154; "Subscriptions to the Capital Stock of Corporations," by James M. Kerr, (1889) 6 Ry. & Corp. L. J. 422.

⁶ *Upton v. Englehart*, 3 Dill. C. C. 496.

⁷ *Dynes v. Shaffer*, 19 Ind. 165; *Hughes v. Antietam Manuf. Co.*, 34 Md. 316; *Cunningham v. Edgefield & Ky. R. Co.*, 2 Head, (Tenn.) 23; *Upton v. Tribilcock*, 91 U. S. 45; *Upton v. Hansbrough*, 3 Biss. C. C. 417; *Kishacoquillas Turnpike Co. v. McConaby*, 16 Serg. & R. 140; *Chubb v. Upton*, 95 U. S. 665; *Upton v. Englehart*, 3 Dill. 496; *Ogilvie v. Knox Insurance Co.*, 22 How. 380; *McDermott v. Harrison*, (1890) 9 N. Y.

may bring suit to have the contract cancelled, or may successfully defend an action brought by the company seeking to enforce it, where he has been induced to make the subscription by fraudulent misrepresentations,¹ contained in a prospectus or report issued by the authority of the company, whether to the public generally or to its own members,² or by fraudulent misrepresentations, in any other way, made by an agent of the company authorized to receive subscriptions, while acting in the line of his employment,³ whether the misrepresentation consisted in an actual statement of falsehood or in a mere suppression of truth, giving to the truth which was told the character of falsehood,⁴ either in a statement of what was

Supl. 184; *Parks v. Evansville &c. R. Co.*, 23 Ind. 567; *Davis v. Dumont*, 37 Iowa, 47; *Oakes v. Turquand*, L. R. 2 H. L. 325.

¹ *Litchfield Bank v. Peck*, 29 Conn. 384; *Brockwell's Case*, 29 L. T. 375. But see *Ogilvie v. Knox Insurance Co.*, 23 How. 380. It must appear, however, that the subscriber relied upon the truth of the misrepresentation, and that it constituted a material inducement to him to make the subscription. *Beach on Railways*, § 131, citing *Linnett v. Males*, 38 Iowa, 25; *Melendy v. Keen*, 89 Ill. 395; *Mitchell v. Deeds*, 49 Ill. 416; *Selma &c. R. Co. v. Anderson*, 51 Miss. 829; *Walker v. Mobile &c. R. Co.*, 34 Miss. 245; *Kennedy v. Panama Royal Mail Co.*, L. R. 2 Q. B. 580; *Kish v. Central Ry. of Venezuela*, 3 De Gex, J. & S. 122.

² *Beach on Railways*, § 133. *Vide infra*, § 529.

³ *Beach on Railways*, § 132; *Crump v. United States Mining Co.*, 7 Gratt. 353; s. c. 56 Am. Dec. 116; *Penobscot R. Co. v. White*, 41 Me. 512; s. c. 66 Am. Dec. 257; *Cunningham v. Edgefield &c. R. Co.*, 2 Head, 23; *Goodrich v. Reynolds*, 31 Ill. 490; *Rives v. Montgomery &c. Plank Road Co.*, 30 Ala. 92; *Ft. Wayne &c.*

R. Co. v. Deane, 10 Ind. 563; *Wight v. Shelby R. Co.*, 16 B. Mon. 4; *Barrington v. Pittsburgh &c. R. Co.*, 34 Pa. St. 358; *Buffalo &c. R. Co. v. Dudley*, 14 N. Y. 336; *Vicksburg &c. R. Co. v. McKean*, 12 La. Ann. 638; *Smith v. Tallahassee &c. R. Co.*, 30 Ala. 650; *Hays v. Ottawa &c. R. Co.*, 61 Ill. 422; *First National Bank v. Hurford*, 29 Iowa, 579. *Contra*, *McClellan v. Scott*, 24 Wis. 81; *Atlanta &c. R. Co. v. Hodnett*, 36 Ga. 669. Statutory commissioners to take subscriptions are not agents of the company under this rule, and misrepresentations by them are not available as a ground of rescission. "While there has been much controversy in the courts of this country over this question of fraudulent misrepresentations by commissioners in the procurement of stock subscriptions, we think the doctrine is pretty well settled that this defense is not available." *Rutz v. Esler &c. Manuf. Co.*, (1878) 3 Bradw. (Ill.) 83, 88.

⁴ *Beach on Railways*, § 134; *Directors &c. of Central Ry. Co. v. Kisch*, L. R. 2 H. L. App. Cas. 99; *Oakes v. Turquand*, L. R. 2 H. L. App. Cas. 325; *New Brunswick &c. Ry. Co. v. Muggeridge*, 1 Dr. & Sm.

known *not* to be true, or in a statement of what was not *known* to be true;¹ provided the misrepresentation were in relation to some material matter of fact affecting the status of the company,² or the nature of the business it was organized to conduct,³ concerning which it was the duty of the agent to be informed,⁴ and the truth of which was not ascertainable by the subscriber as well as by the agent.⁵ In this

363, 381; *Heyman v. European Central Ry. Co.*, L. R. 7 Eq. Cas. 154. *Cf.* *Pulsford v. Richards*, 17 Beav. 87.

¹ *Beach on Railways*, § 134; *Henderson v. Railroad Co.*, 17 Tex. 560; s. c. 67 Am. Dec. 675; *Edgington v. Fitzmaurice*, 29 Ch. Div. 459; *Reese River Co. v. Smith*, L. R. 4 H. L. 64, affirming s. c. L. R. 2 Eq. 264.

² *Waldo v. Chicago &c. R. Co.*, 14 Wis. 575; *Montgomery &c. Ry. Co. v. Matthews*, 77 Ala. 357; *McClellan v. Scott*, 24 Wis. 81; *Wickham v. Grant*, 28 Kans. 517; *Melendy v. Keen*, 89 Ill. 395; *Bell's Case*, 22 Beav. 35. But see *Jackson v. Turquand*, L. R. 4 H. L. 305. In a recent action by a railroad company in Georgia on a note given for a subscription to its capital stock, it was held that a good defense is set up by a plea that plaintiff's agents procured the subscriptions by representations that plaintiff would issue stock only to the amount of three thousand dollars per mile, and bonds only to the amount of twelve thousand per mile, whereas, at the time the representations were made, stock had already been issued to the amount of twelve thousand and bonds to the amount of fifteen thousand dollars per mile. *Weems v. Georgia, M. & G. R. Co.*, (Ga. 1890) 11 S. E. Rep. 503. So misrepresentations that the work of construction has reached a certain stage of completion, (*Peel's Case*, L. R. 2 Ch. App. 674) that certain persons are directors, (*Blake's Case*, 34 Beav. 639) and

that the directors have taken stock in the company, (*Henderson v. Lacon*, L. R. 5 Eq. Cas. 249) have been held to be material and good by way of defense.

³ *West v. Crawfordsville &c. Co.*, 19 Ind. 242; *Blackburn's Case*, 3 Drew. 409.

⁴ *Selma &c. R. Co. v. Anderson*, 51 Miss. 829; *Waldo v. Chicago &c. R. Co.*, 14 Wis. 575.

⁵ *Connecticut &c. R. Co. v. Bailey*, 24 Vt. 465; s. c. 58 Am. Dec. 181; *Thornburg v. Newcastle &c. R. Co.*, 14 Ind. 499; *Johnson v. Crawfordville R. Co.*, 11 Ind. 280; *Blodgett v. Morrill*, 20 Vt. 509; *Haskell v. Worthington*, (1888) 94 Mo. 560. "Every contracting person has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party, and unknown to him, as a basis of a mutual engagement, and he is under no obligation to investigate and verify statements, to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith." *Mead v. Bunn*, 32 N. Y. 274; *Upton v. Englehart*, 3 Dill. 496; *Kisch v. Central Ry. Co.*, L. R. 2 H. L. App. Cas. 99; *New Brunswick &c. Ry. Co. v. Muggeridge*, 1 Dr. & S. 363. But it is no defense to an action on stock subscription that the words "of St. Louis" were added to the name of the company, as given in the subscription paper, upon its incorporation, or that defendant was induced

connection matters of fact are distinguished from mere matters of opinion, of expectation or of hope.¹ And as every one

to sign by the false representation that certain of his friends had agreed to take stock in the company, there having been opportunity to ascertain the truth of the assertion. *Haskell v. Worthington*, (1888) 94 Mo. 560.

¹ *Beach on Railways*, § 136; *Milwaukee &c. R. Co. v. Field*, 12 Wis. 346; *Johnson v. Pensacola &c. R. Co.*, 9 Fla. 299; *McCarthy v. Selinsgrove &c. R. Co.*, 87 Pa. St. 332; *Cass v. Pittsburgh &c. R. Co.*, 80 Pa. St. 31; *Piscataqua Ferry Co. v. Jones*, 39 N. H. 491; *Corwith v. Culver*, 69 Ill. 502; *Cincinnati &c. R. Co. v. Pearce*, 28 Ind. 502; *Thornburgh v. Newcastle &c. R. Co.*, 14 Ind. 499; *Selma &c. R. Co. v. Anderson*, 51 Miss. 829; *Wight v. Shelby R. Co.*, 16 B. Mon. 4; s. c. 63 Am. Dec. 522; *Sanger v. Upton*, 91 U. S. 56; *Upton v. Hansbrough*, 3 Biss. C. C. 417; *Tuckerman v. Brown*, 33 N. Y. 297; *Syracuse &c. R. Co. v. Gere*, 4 Hun. 392; *Greenville &c. R. Co. v. Smith*, 6 Rich. (S. C.) 91; *Ellison v. Mobile &c. R. Co.*, 36 Miss. 272; *Swartara R. Co. v. Brune*, 6 Gill, (Md.) 41; *White Mountain &c. R. Co. v. Eastman*, 34 N. H. 124; *McRae v. Atlantic &c. R. Co.*, 5 Jones (N. C.) Eq. 395; *Dill v. Wabash Valley R. Co.*, 21 Ill. 91; *Oregon Central R. Co. v. Scoggin*, 3 Oregon. 161; *McAllister v. Indianapolis &c. R. Co.*, 15 Ind. 11; *Miller v. Wildcat Gravel Road*, 57 Ind. 241; *Jewett v. Valley R. Co.*, 34 Ohio St. 601; *Henry v. Vermilion &c. R. Co.*, 17 Ohio, 187. Thus representations as to the probable cost and profit of the road, (*Ogilvie v. Knox Insurance Co.*, 22 How. 380; *Walker v. Mobile &c. R. Co.*, 34 Miss. 245; *Andrews v. Ohio &c. R. Co.*, 14 Ind. 169) the value of a federal grant, (*Walker v. Mobile &c. R. Co.*,

34 Miss. 245) the ability of the company to complete the road within a certain time, (*Montgomery Southern Ry. Co. v. Matthews*, 77 Ala. 357; *Parker v. Thomas*, 19 Ind. 213; *Brownlee v. Ohio &c. R. Co.*, 18 Ind. 68; *Bish v. Bradford*, 17 Ind. 490; *Hardy v. Merriweather*, 14 Ind. 203, and declarations of an agent as to the route of the road, have been held to be mere expressions of opinion and as such not to release the subscriber nor bind the company, unless the agent made them with intent to deceive and with full knowledge of their falsity. *Montgomery Southern Ry. Co. v. Matthews*, 77 Ala. 357; *Mississippi &c. R. Co. v. Cross*, 20 Ark. 443. And as statements with regard to the future,—the prospects and anticipated value of the enterprise, (*Salem Mill Dam Corporation v. Ropes*, 9 Pick. 187; s. c. 19 Am. Dec. 363; *Hardy v. Merriweather*, 14 Ind. 203; *Vawter v. Ohio &c. R. Co.*, 14 Ind. 174) and representations as to what the corporation will do, (*Mississippi &c. R. Co. v. Cross*, 20 Ark. 443; *Eakright v. Logansport &c. R. Co.*, 13 Ind. 477; *Evansville &c. R. Co. v. Posey*, 12 Ind. 363; *Johnson v. Crawfordville &c. R. Co.*, 11 Ind. 280; *Four Mile Valley R. Co. v. Bailey*, 18 Ohio St. 208. But see *Atlantic &c. R. Co. v. Hodnett*, 36 Ga. 669; *Vicksburgh &c. R. Co. v. McKean*, 12 La. Ann. 638; *Martin v. Pensacola &c. R. Co.*, 8 Fla. 376; s. c. 73 Am. Dec. 713; *Mississippi &c. R. Co. v. Cross*, 20 Ark. 443) must necessarily be merely a matter of opinion, they do not ordinarily constitute a ground for the rescission of contracts of subscription. *Beach on Railways*, § 136. If, however, the opinion is falsely expressed with in-

is presumed to know the law, a misrepresentation as to the legal effect of the contract is not deemed to have deceived the subscriber.¹ But no one is presumed to know the law of a foreign State, and, accordingly, misrepresentations concerning it may amount to fraud.²

§ 528. Qualifications of the foregoing rule.—After railroad stocks had depreciated, and railroad schemes had become less popular than they formerly were, it became common to set up fraud in obtaining the subscriptions as a ground of avoiding their payment, and difficult questions were often thus presented. Representations which, in the feverish excitement produced by an extraordinary temporary success, seemed to all as probably below the promised reality, afterwards, in the ebbing of the railroad tide to a lower stage than was natural, appeared like stupendous attempts at swindling; and means then used to obtain subscriptions of stock which the deluded, no doubt, sincerely thought justified by the supposed certain profitable results, now, in more sober times, shock the moral sensibility of every right-minded man. But when these questions were presented to the courts, they endeavored to sift the exaggerated representation from the deliberate assertion of a material fact of which the subscriber had not the means of knowledge, and for the truth of which he rightly relied upon the solicitor of stock authorized to assert it for his principal; it was the aim of the judiciary to separate the fraudulent device of which the subscriber was innocent from those in which he participated; in short they decided upon railroad — upon corporation contracts, under the guidance and in the application of the established rules governing their action upon contracts in other cases, and between private individuals.³ Accordingly, it was established that

tent to deceive, the contract thereby procured will be void, unless the representation relates to a matter equally open to both parties. *Montgomery Southern Ry. Co. v. Matthews*, 77 Ala. 357.

¹ *Beach on Railways*, § 137; *Upton v. Tribilcock*, 91 U. S. 45; *Hall v. Selma &c. R. Co.*, 6 Ala. 741; *Thornburgh v. Newcastle &c. R. Co.*,

14 Ind. 499; *Clem v. Newcastle &c. R. Co.*, 9 Ind. 488; *Parker v. Thomas*, 19 Ind. 213. *Cf. North Eastern R. Co. v. Rodriques*, 10 Rich. (S. C.) 278.

² *Upton v. Englehart*, (1874) 3 Dill. 496.

³ *Anderson v. New Castle &c. R. Co.*, (1859) 12 Ind. 376; s. c. 74 Am. Dec. 218, 220.

where there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission, unless it is such as to show that there is a complete difference in substance between what was supposed to be, and what were the facts, "so as to constitute a failure of consideration."¹ The weight of authority seems to hold that a subscriber seeking release from his contract on the ground of fraud must show some injury or detriment resulting therefrom.² And many of the American cases hold that there must have been a fraudulent purpose in contemplation or that the agent knew that the statements were untrue;³ and intended them to influence the action of the subscriber.⁴ Thus it is held that false representations by the agent of a railroad corporation, soliciting subscriptions for stock from persons living along the contemplated route, in respect to the intended location, and the time within which it will be completed to a particular place, are not fraudulent, nor available as a defense to an action on a subscription for stock made on the faith of them, unless known by the agent to be false, and made by him with intent to deceive;⁵ and that proof of the promoters of a railroad scheme having guarantied that the route would pass near a certain tract, and of its having deviated therefrom, will not discharge one who has subscribed in reliance on that statement, unless a fraudulent intent be established.⁶ A court of equity will

¹ *Kennedy v. Panama &c. Co.*, L. R. 2 Q. B. 580.

² *Keller v. Johnson*, 11 Ind. 337; s. c. 71 Am. Dec. 355; *Cunningham v. Edgefield &c. R. Co.*, 2 Head, 23. *Cf. Hays v. Ottawa &c. R. Co.*, 61 Ill. 422. Thus a false statement as to the amount of stock that has been subscribed, is not ordinarily a material misrepresentation. *Goodrich v. Reynolds*, 31 Ill. 490; *Parker v. Thomas*, 19 Ind. 213; *Brownlee v. Ohio &c. R. Co.*, 18 Ind. 68; *Bish v. Bradford*, 17 Ind. 490; *Hardy v. Merriweather*, 14 Ind. 203. There is, however, some authority to the contrary. *Ross v. Estates Investment Co.*, L. R. 3 Ch. 692.

³ *Montgomery Southern Ry. Co. v.*

Matthews, (1885) 77 Ala. 357; s. c. 54 Am. Rep. 60; *Selma &c. R. Co. v. Anderson*, 51 Miss. 829; *Cunningham v. Edgefield &c. R. Co.*, 2 Head, 23; *Nugent v. Cincinnati &c. R. Co.*, 2 Disney, 302; *Story on Agency*, §§ 127, 135, 137, 452; *Chitty on Contracts*, 682.

⁴ *Kennedy v. Panama Royal Mail Co.*, L. R. 2 Q. B. 580; *Thom v. Begland*, 8 Ex. 725; *Atwood v. Small*, 2 Cl. & F. 282; *Taylor v. Ashton*, 11 Mees. & W. 415.

⁵ *Montgomery Southern Ry. Co. v. Matthews*, 77 Ala. 357; s. c. 54 Am. Rep. 60.

⁶ *Braddock v. Philadelphia, Marlton &c. R. Co.*, 45 N. J. 363.

not release a subscriber on the ground of fraud, when by so doing other subscribers or the creditors of the corporation would be injured thereby.¹ And one who has been induced to subscribe for corporate stock by fraudulent representations, can not recover the amount paid until the claims of creditors of the corporation are satisfied.² If a person is induced by the fraudulent representations of the promoter of a corporation to subscribe for shares of stock in the corporation, and pays his subscription to the person holding the office of treasurer, he can not, by rescinding the contract, maintain an action for money had and received against the other shareholders, even if the incorporation is invalid, and the shareholders are partners.³ He can not be both plaintiff and defendant. His remedy, if upon the facts he is entitled to any, is by an action of tort against the person or persons who practiced the fraud upon him; or, by a bill in equity to rescind the contract of partnership, to have the partnership articles cancelled as to him, and to compel those who practiced the fraud to repay the money and to make further compensation and indemnity, if such relief is necessary.⁴ For the promoters are liable in damages for misrepresentations made by them.⁵

§ 529. Misrepresentations in prospectuses.—The liability of a company on a prospectus is very strict. Those who issue a prospectus holding out to the public great advantages which would accrue to persons who should take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating a fact which is not so, but to omit no one fact within their knowledge the existence of which may in any degree affect the nature, or extent, or quality of the privi-

¹ *Chubb v. Upton*, 95 U. S. 665; *Miller v. Hanover Junction R. Co.*, 87 Pa. St. 95; *Graff v. Pittsburgh &c. R. Co.*, 31 Pa. St. 489.

² *Turner v. Grangers' Life &c. Ins. Co.*, 65 Ga. 649; s. c. 38 Am. Rep. 841.

³ *Perry v. Hale*, (1887) 143 Mass. 540.

⁴ *Perry v. Hale*, (1887) 143 Mass. 540, 542, citing *Richards v. Todd*, 127 Mass. 167; *Smith v. Everett*, 126 Mass. 304; *Duff v. Maguire*, 99 Mass. 300; *Rawlins v. Wickham*, 3 De G. & J. 304; 2 *Lindley on Partnership*, (4th ed.) 925, 927, *et seq.*

⁵ *Paddock v. Fletcher*, 42 Vt. 389.

leges and advantages which the prospectus holds out as inducements to subscribe.¹ Thus where a prospectus stated that the company had obtained a concession from a foreign government to make a railway, when in truth the company had contracted to purchase the concession from another company for a large sum, this was held to be a material misrep-

¹ *New Brunswick & C. Ry. Co. v. Muggeridge*, 3 L. T. Rep. N. S. 681; "Relief from Shares," 44 L. T. 40; *Atlanta &c. R. Co. v. Hodnett*, 36 Ga. 669; *Pulsford v. Richards*, 17 Jur. 865; *Oakes v. Turquand*, L. R. 2 H. L. App. Cas. 325; *Central Ry. Co. v. Kisch*, L. R. 2 H. L. 99; *Heyman v. European &c. Ry. Co.*, L. R. 7 Eq. 154; *Hallows v. Fernie*, L. R. 3 Eq. 520; *Blake's Case*, 34 Beav. 639. In a recent English case, a company which was incorporated on the 25th of September, 1889, issued a prospectus on the 27th of the same month representing that certain persons, four in number, were the directors. S., on the 27th of September, 1889, applied for five hundred shares on the faith of the statement in the prospectus that these persons were directors, and on the 1st of October, he received notice of allotment. On the 12th of November, 1889, S. took out a summons to have his name removed from the register of shareholders, and for the return of the amount which he had paid on allotment, on the ground that the statement in the prospectus as to the directors was untrue. It appeared that the persons named in the prospectus as directors were not directors at the time the notice of allotment was sent out, but the promoters of the company and their nominees had been actually acting as directors under the provisions of the articles of association, which stated that the first directors were to be named by a majority of

the subscribers to the memorandum of association, and until such directors should have been appointed the subscribers themselves were to be deemed to be and to have power to act as directors. Some of these subscribers met on the 26th of September and passed resolutions that the prospectus be approved and issued, and that a certain agreement relating to payment of the preliminary and formation expenses be adopted; and on the 1st of October they held another meeting and passed resolutions for the allotment of shares, and for the election of the four persons named in the prospectus as directors. Two of the elected directors did afterwards accept the office and act, but one never accepted at all. S. swore that he applied for the shares believing that the persons named in the prospectus were the directors, and that he would not have applied for any shares in the company if he had known that they were not in fact directors. The company was ordered to be wound up on the 23d of November, 1889. The court held that the prospectus was false, as at the date it was issued persons other than those named therein were acting as directors, and that S. was entitled to have his name removed from the register of shareholders, and to prove in the winding up for the amount paid in respect of the shares. *In re Johannesburg Hotel Co., Limited*, *Sarle's Case*, (Ch. Div. 1890) *per Chitty, J.*, 8 Ry. & Corp. L. J. 197.

resentation, entitling a shareholder to have his purchase of shares set aside. The Lord Chancellor stated his opinion that the public who were invited by a prospectus to join in any new adventure ought to have the same opportunity of judging of everything which had a material bearing on its true character as the promoters themselves possessed.¹ The company can not plead that the reports were intended for stockholders alone. The law holds that the report is known and intended to be known to all who contemplate becoming stockholders.²

§ 530. **Parol evidence of fraud.**—The general rule that parol representations are inadmissible to vary the terms of a written agreement of subscription,³ is not applicable to those representations which amount to fraud on the part of the company, were made at the time of subscribing, and were the inducements by means of which the subscription was obtained.⁴ Parol evidence is admissible to prove fraudulent misrepresentations.⁵ In such cases, however, parol evidence is

¹ *Venezuela Ry. Co. v. Kisch*, 16 L. T. Rep. N. S. 500; s. c. L. R. 2 H. L. App. Cas. 99, where, however, it was said that representations of a prospectus are to be taken with some allowance "for the sanguine expectations of the promoters of the adventure; and no prudent man will accept the prospects which are always held out by the originators of every new scheme, without considerable abatement."

² *New Brunswick &c. Ry. Co. v. Conybeare*, 9 H. L. Cas. 711; *National Exchange Co. v. Drew*, 32 Eng. Law & Eq. 1.

³ *Smith v. Plank Road Co.*, 30 Ala. 650; *Mississippi, O. &c. R. Co. v. Cross*, 20 Ark. 343; *Goodrich v. Reynolds*, 31 Ill. 490; *Connecticut & P. Riv. R. Co. v. Bailey*, 24 Vt. 465; *Ogilvie v. Knox Ins. Co.*, 22 How. 380.

⁴ *Rives v. Montgomery Plank Road Co.*, 30 Ala. 92; *Martin v. Pensacola*

& G. R. Co., 8 Fla. 370; *Miller v. Wildcat Gravel Road Co.*, 57 Ind. 241; *Davis v. Dumont*, 37 Iowa, 47; *Kennebeck & P. R. Co. v. Waters*, 34 Me. 369; *Water Valley Manuf. Co. v. Seaman*, 53 Miss. 655; *Ellison v. Mobile & O. R. Co.*, 36 Miss. 572; *Piscataqua Ferry Co. v. Jones*, 39 N. H. 491; *Vreeland v. New Jersey Stone Co.*, 29 N. J. Eq. 188; *Custar v. Titusville Gas & Water Co.*, 63 Pa. St. 381; *East Tennessee & V. R. Co. v. Gammon*, 5 Sneed, (Tenn.) 567; *Blodgett v. Morrill*, 20 Vt. 509; *Crump v. United States Mining Co.*, 7 Gratt. 352; "Subscriptions to the Capital Stock of Corporations," by James M. Kerr, (1889) 6 Ry. & Corp. L. J. 422.

⁵ *Connecticut &c. R. Co. v. Bailey*, 24 Vt. 465; s. c. 58 Am. Dec. 181; *Wight v. Shelby R. Co.*, 16 B. Mon. 5; *Kennebec R. Co. v. Waters*, 34 Me. 369; *Connecticut &c. R. Co. v. Baxter*, 32 Vt. 805; *Blodgett v. Mor-*

not introduced for the purpose of varying or contradicting the contract but to show that no contract was properly formed.¹

§ 531. **Parol agreements and conditions.**—Parol evidence is not admissible to vary the terms of a subscription to the capital stock of a corporation, or to show a discharge therefrom in any manner other than that required by the terms of subscription, charter, and by-laws.² All separate agreements

rill, 20 Vt. 509; Piscataqua Ferry Co. v. Jones, 39 N. H. 491; Jewett v. Valley Ry. Co., 34 Ohio St. 601; Henderson v. Railroad Co., 17 Tex. 560; s. c. 67 Am. Dec. 675; New York Exchange Co. v. De Wolf, 31 N. Y. 273; s. c. 5 Bosw. 593; Burrows v. Smith, 10 N. Y. 550; Ellison v. Mobile &c. R. Co., 36 Miss. 572; Walker v. Mobile &c. R. Co., 34 Miss. 245; Hester v. Memphis R. Co., 32 Miss. 378; La Grange R. Co. v. Mays, 29 Mo. 64.

¹ New York Exchange Co. v. De Wolf, 31 N. Y. 273; Jewett v. Valley R. Co., 34 Ohio St. 601; "Subscriptions to the Capital Stock of Corporations," by James M. Kerr, (1889) 6 Ry. & Corp. L. J. 422.

² Marshall Foundry Co. v. Killian, (1888) 99 N. C. 501; s. c. 6 Am. St. Rep. 539; Topeka Manuf. Co. v. Hale, (1888) 39 Kan. 23; Minneapolis Threshing Machine Co. v. Davis, (1889) 40 Minn. 110; s. c. 12 Am. St. Rep. 701; Melvin v. Lamar Ins. Co., 80 Ill. 446; s. c. 22 Am. Rep. 199; Anderson v. Newcastle &c. R. Co., 12 Ind. 376; s. c. 74 Am. Dec. 218; Robinson v. Pittsburgh &c. R. Co., 32 Pa. St. 384; s. c. 72 Am. Dec. 792; New Albany &c. R. Co. v. Fields, 10 Ind. 187; Jewell v. Rock River Paper Co., 101 Ill. 57; Chouteau Ins. Co. v. Floyd, 74 Mo. 286; Swartout v. Michigan &c. R. Co., 24 Mich. 389; Walker v. Mobile &c. R. Co., 34 Miss. 245; White Mountains R. Co. v. Eastman, 34 N. H. 124;

Connecticut &c. R. Co. v. Bailey, 24 Vt. 465; s. c. 58 Am. Dec. 181; Upton v. Tribilcock, 91 U. S. 45; Beach on Railways, § 128; Whitehall &c. R. Co. v. Myers, 16 Abb. Pr. N. S. 34; Ellison v. Mobile &c. R. Co., 36 Miss. 572; Mississippi &c. R. Co. v. Cross, 20 Ark. 443; Johnson v. Pensacola &c. R. Co., 9 Fla. 299; North Carolina R. Co. v. Leach, 4 Jones, (N. C.) 340; East Tennessee &c. R. Co. v. Gammon, 5 Sneed, (Tenn.) 567; Wight v. Shelby R. Co., 16 B. Mon. 4; McClure v. People's Freight Ry. Co., 90 Pa. St. 269; Dill v. Wabash Valley R. Co., 21 Ill. 91; Ridgefield &c. R. Co. v. Brush, 43 Conn. 86; Braddock v. Philadelphia &c. R. Co., 45 N. J. 363; Kennebeck &c. R. Co. v. Waters, 34 Me. 369; Keller v. Johnson, 11 Ind. 337; s. c. 71 Am. Dec. 355; Evansville &c. R. Co. v. Posey, 12 Ind. 333; Thornburgh v. Newcastle &c. R. Co., 14 Ind. 499; Cincinnati &c. R. Co. v. Pearce, 28 Ind. 502; New Albany &c. R. Co. v. Slaughter, 10 Ind. 218; Eakright v. Logansport &c. R. Co., 13 Ind. 404; Carlisle v. Evansville &c. R. Co., 13 Ind. 477; McAllister v. Indianapolis &c. R. Co., 15 Ind. 11; Thigpen v. Mississippi Central S. R. Co., 32 Miss. 347; Henry v. Vermillion &c. R. Co., 17 Ohio St. 187; Graff v. Pittsburgh &c. R. Co., 91 Pa. St. 489. *Contra*, Mahan v. Wood, 44 Cal. 463, where the par value of the shares was not what was promised; Rives v. Montgomery &c.

and conditions made at the time of subscribing which are inconsistent with the written contract, are void, whether they be verbal,¹ or are contained in a separate written contract.² When, however, the whole contract of subscription was originally oral, and afterwards a part only was reduced to writing, parol evidence is admissible to prove the whole original contract.³ And it may be shown by parol that a corporate agent agreed that the signing of one's name upon a blank sheet of paper should not be a subscription to stock until the person so signing should see and approve the agreement subsequently to be written above.⁴ But as a general rule, parol declarations made by agents of the company can only avail a subscriber to enable him to escape his subscription when they amount to fraud.⁵

§ 532. Conditions precedent.— Whether a subscription to stock be precedent or subsequent, is a question purely of intent, to be determined by considering the words both of the

Plank R. Co., 30 Ala. 92. So in Pennsylvania parol evidence is admissible where but for the verbal contract, the subscription would not have been made. *Rinesmith v. People's Freight Ry. Co.*, 90 Pa. St. 262; *Caley v. Philadelphia &c. R. Co.*, 80 Pa. St. 363.

¹ *Whitehall &c. R. Co. v. Myers*, 16 Abb. Pr. N. S. 34; *Mississippi &c. R. Co. v. Cross*, 20 Ark. 443; *Thigpen v. Mississippi Central R. Co.*, 32 Miss. 347; *Cunningham v. Edgefield &c. R. Co.*, 2 Head, (Tenn.) 23; *Miller v. Hanover Junction R. Co.*, 87 Pa. St. 95; *North Carolina R. Co. v. Leach*, 4 Jones, (N. C.) 340; *Connecticut &c. R. Co. v. Bailey*, 24 Vt. 465; *Blodgett v. Morrill*, 2 Vt. 509; *Evansville &c. R. Co. v. Posey*, 12 Ind. 363; *Johnson v. Crawfordville &c. R. Co.*, 11 Ind. 280. But see *Rinesmith v. People's Freight Ry. Co.*, 90 Pa. St. 262; *Beach on Railways*, § 128.

² *White Mountains R. Co. v. Eastman*, (1856) 34 N. H. 124; *Brownlee*

v. Ohio &c. R. Co., (1862) 18 Ind. 68. But see *Beach on Railways*, § 94.

³ *Beach on Railways*, § 128; *Brewers' Fire Insurance Co. v. Burger*, 10 Hun, 56; *Bross v. Cairo &c. R. Co.*, 9 Bradw. 363. *Cf. Eighmie v. Taylor*, 98 N. Y. 288; *Hendrix v. Academy of Music*, 73 Ga. 437.

⁴ *Beecher v. Dillsburg &c. R. Co.*, 76 Pa. St. 306. So again parol evidence is admissible to show that a subscription delivered in escrow was not absolute. *Ottawa &c. R. Co. v. Hall*, 1 Bradw. 612. *Cf. Jewell v. Rock River &c. R. Co.*, 101 Ill. 57; *Tonica &c. R. Co. v. Stein*, 21 Ill. 96; *Beach on Railways*, § 76. But see *Minneapolis Threshing Machine Co. v. Davis*, (1889) 40 Minn. 110; s. c. 12 Am. St. Rep. 701.

⁵ *Beach on Railways*, § 128; *Martin v. Pensacola &c. R. Co.*, 8 Fla. 370; s. c. 73 Am. Dec. 713; *Vicksburg &c. R. Co. v. McKean*, 12 La. Ann. 638; *Mississippi &c. R. Co. v. Cross*, 20 Ark. 443.

clause containing the condition and of the whole contract, as well as the nature of the act required and the subject matter to which it relates.¹ When subscriptions are made to take stock in an existing or proposed corporation, upon a condition precedent, as, for example, upon condition that a specified amount of subscriptions shall hereafter be obtained, the contract of the several subscribers is twofold in character. It is, in a sense, a contract between the several subscribers,* which can not be withdrawn or revoked as to any one without the acquiescence of all. It is also a continuing offer or proposition to the corporation to take and pay for the amount of stock subscribed, upon the terms proposed, whenever the specified amount of subscriptions shall have been obtained. The obtaining of the amount specified within a reasonable time is an acceptance of the proposition or offer by the corporation, and the contract of each subscriber then becomes absolute and unconditional.² A subscriber can not withdraw his subscription even though it be conditional, unless unreasonable delay occurs in performing the condition.³ When the company obtains solvent subscriptions for the amount specified, that becomes an effectual acceptance of the offer of all those who have previously subscribed. Their subscriptions are no longer conditional, but become absolute, and are thereafter payable, according to the terms of the contract, on the call of the board of directors.⁴ The subscribers thereupon become

¹ *Beach on Railways*, § 97, citing *Bucksport &c. R. Co. v. Inhabitants of Bremer*, 67 Me. 295; *Chamberlain v. Painesville &c. R. Co.*, 15 Ohio St. 225; "Conditional Application for Shares," 17 Sol. J. & Rep. 383; Note to *Parker v. Thomas*, 81 Am. Dec. 392.

² 1 *Mor. Priv. Corp.* § 47; *Cravens v. Eagle Cotton Mills Co.*, (1889) 120 Ind. 600; s. c. 6 Ry. & Corp. L. J. 411; *Minneapolis Thresher Machine Co. v. Davis*, (1889) 40 Minn. 110; s. c. 12 Am. St. Rep. 701; *Morawetz on Corporations*, § 47. Cf. *Bucksport &c. R. Co. v. Buck*, 65 Me. 536; *Iowa &c. R. Co. v. Perkins*, 28 Iowa, 281. A subscription to a ferry company

conditioned upon sufficient subscriptions for the corporate purposes being secured, has been held not enforceable until funds for the land, structures and boats had been secured. *People's Ferry Co. v. Balch*, 74 Mass. 203.

³ *Johnson v. Plank Road Co.*, 16 Ind. 389; *Railroad Co. v. Mason*, 16 N. Y. 451; *McClure v. Railway Co.*, 90 Pa. St. 269.

⁴ *Railroad Co. v. Pickens*, 5 Ind. 247; *Estell v. Turnpike Co.*, 41 Ind. 174; *Beckner v. Turnpike Co.*, 65 Ind. 468; *Warehousing Co. v. Badger*, 67 N. Y. 294, 300; *Cravens v. Eagle Cotton Mills Co.*, (1889) 120 Ind. 600; s. c. 6 Ry. & Corp. L. J. 411.

entitled to all the rights and privileges of stockholders, and they come under the correlative obligations and duties of holders of stock in a corporation.¹

§ 533. Conditions subsequent.—A condition subsequent is one which does not affect the subscriber's liability to take and pay for his shares, but which gives him a right of action against the corporation upon its failure to perform the specified act.² For example, a specification in notes given for a subscription to the stock of a railway company that the road is to be operated independently of a certain existing railroad, relates to what is to be done after the notes are paid, not before, and is therefore a condition subsequent.³ In the case last cited, notes given by a subscriber for capital stock in a railroad, each note being for an instalment, and payable on completion of a section of the road, "ready for the cross-ties, trestles and bridges," of which completion publication in a newspaper by the directors was to be conclusive notice, were held to be mature and payable as soon as the publication was made, although the notes described the road as one which was to have a certain privilege, and the privilege had not yet been secured. The securing of it was not a condition precedent to payment, the specification thereof being merely part of the description of the road as it was to be ultimately, but not as it was to be at maturity and on payment of the subscriptions.⁴ So an agreement that commissioners should be appointed to see that other conditions are carried out, is a condition subsequent.⁵ And a condition that the money paid shall be expended on a particular part of the route is necessarily subsequent.⁶ Although, for the purpose of procuring a subscription, the corporation contracted that a side track would be constructed on the premises, or "at the place" of the subscriber, this stipulation contemplated that the side track would

¹ *University v. Scoonover*, 114 Ind. 351; *Cravens v. Eagle Cotton Mills Co.*, (1889) 120 Ind. 600; s. c. 6 Ry. & Corp. L. J. 411.

² *Belfast &c. Ry. Co. v. Moore*, 60 Me. 561; *Mill Dam Foundry v. Harvey*, 38 Mass. 417, 437; *Beach on Railways*, § 97.

³ *Johnson v. Georgia, M. & G. R. Co.*, (1889) 81 Ga. 725.

⁴ *Johnson v. Georgia, M. & G. R. Co.*, (1889) 81 Ga. 725.

⁵ *Shaffner v. Jeffries*, (1853) 18 Mo. 512.

⁶ *Lane v. Brainerd*, (1862) 30 Conn. 565.

be constructed after the payment, there being no agreement that its construction was to be a condition precedent.¹ A stipulation that alterations shall be ordered only by a vote of the directors, is also regarded as a subsequent condition.² An action, however, can not be maintained for an instalment not maturing until after all work on the road has been abandoned.³ A condition as to location is fulfilled when the route is fixed in accordance with the contract,⁴ and the subscription thereupon becomes absolute although the road has not been built.⁵ Even where one subscribed upon condition that the line of the road should be "located and built" within one mile of the post-office in the village of Three Rivers, he was held to be assessable thereon when the road was finally *located* within one mile of the post-office, notwithstanding it was not yet *constructed*. For, applying the condition to the subject-matter

¹ Johnson v. Georgia, M. & G. R. Co., (1889) 81 Ga. 725.

² Bucksport & C. R. Co. v. Buck, 68 Me. 81. Under subscriptions to railroad stock on the following terms: "One-fourth to be paid when the road is completed to a certain county line;" the remainder "to be paid in four equal instalments, of four months, as the work progresses through the county, provided the company established a depot" at a certain point,—the erection of the depot is not a condition precedent to payment of the subscriptions; and an assignee of the subscription list may maintain an action thereon for a call maturing after the road is completed to the county line, and while work thereon is in progress; although, at the time the action is brought, work on the road has been abandoned, the depot has not been built, the railway company is insolvent, and its property and franchises have been sold. Paducah & M. R. Co. v. Parks, (1888) 2 Pickle, (Tenn.) 554. An agreement to subscribe for the stock of a railroad company provided that the subscription should

not be due until the road was completed between named points. The separate undertaking of defendant annexed to the agreement bound him to make the payment "when the road is completed on the within terms." It was held that the company need not complete the whole road before demanding such payment, but only the part between the points named. Leshner v. Karshner, (Ohio, 1890) 24 N. E. Rep. 882.

³ Paducah & M. R. Co. v. Parks, (1888) 2 Pickle, (Tenn.) 554.

⁴ Smith v. Allison, 23 Ind. 366; McMillan v. Maysville & C. R. Co., 15 B. Mon. 218; s. c. 61 Am. Dec. 181; Miller v. Pittsburgh & C. R. Co., 41 Pa. St. 237; s. c. 80 Am. Dec. 570; O'Neal v. King, 3 Jones, (N. C.) 517; North Missouri & C. R. Co. v. Winkler, 29 Mo. 218; Parker v. Thomas, 28 Ind. 277; Branham v. Record, 42 Ind. 181; Woonsocket & C. R. Co. v. Sherman, 8 R. I. 564; Chamberlain v. Painesville & C. R. Co., 15 Ohio St. 225; Warner v. Calendar, 15 Ohio St. 190.

⁵ Swartwout v. Michigan Air Line R. Co., (1872) 24 Mich. 389, 405, cit-

to which it relates, it is seen that to consider the latter a condition precedent would impose the unreasonable obligation upon the company of building the road without money and delivering in a finished work to the subscribers.¹ So in respect to an issue of stock, a promise to pay a certain amount therefor upon condition that the company's road shall have been constructed to designated points by a specified date, upon which the money shall be paid and the shares issued, requires the shares to be issued only after payment.²

§ 534. **Recitals as implied conditions.**—Recitals in the contract of subscription or charter or articles of association are frequently regarded as implied conditions.³ Thus if the charter of a corporation require certain acts to be performed before the shareholders shall become liable upon their subscription, the performance of those acts is a condition precedent to the liability upon their stock subscriptions.⁴ And a

ing *Chamberlain v. Painesville &c. R. Co.*, 15 Ohio St. 225. *Acc. Miller v. Pittsburgh &c. R. Co.*, 40 Pa. St. 237; s. c. 80 Am. Dec. 570. See, also, *McMillan v. Maysville &c. R. Co.*, 15 B. Mon. 218; s. c. 61 Am. Dec. 181. So, also, conditions that the road shall "pass through" a certain county, (*North Missouri R. Co. v. Winkler*, 29 Mo. 318; *Chamberlain v. Painesville &c. R. Co.*, 15 Ohio St. 225; *Ashtabula &c. R. Co. v. Smith*, 15 Ohio St. 328. *Cf. Pittsburgh &c. R. Co. v. Biggar*, 34 Pa. St. 455) or if the road "shall be built" through a certain place, are construed to refer to the location of the route and not to the completion of construction. *Woonsocket Union R. Co. v. Sherman*, 8 R. I. 564; *Swartwout v. Michigan &c. R. Co.*, 24 Mich. 389; *Warner v. Callender*, 20 Ohio St. 190; *Beach on Railways*, § 111.

¹ *Miller v. Pittsburgh &c. R. Co.*, 40 Pa. St. 237; s. c. 80 Am. Dec. 570; *Pittsburgh &c. R. Co. v. Biggar*, 34 Pa. St. 455; *Woonsocket Union R. Co. v. Sherman*, 8 R. I. 564;

Warner v. Callender, 20 Ohio St. 190. *Cf. North Missouri R. Co. v. Winkler*, 29 Mo. 318; *Belfast &c. Ry. Co. v. Moore*, 60 Me. 561, 576; *Bucksport &c. R. Co. v. Inhabitants of Bremer*, 67 Me. 295; *Chamberlain v. Painesville &c. R. Co.*, 15 Ohio St. 225.

² *Wemple v. St. Louis, J. & S. R. Co.*, (1887) 120 Ill. 196.

³ *Carlisle v. Cahawba & M. R. Co.*, 4 Ala. 76; *Caley v. Philadelphia &c. R. Co.*, 80 Pa. St. 363; *Burrows v. Smith*, 10 N. Y. 550; *Lamb v. Anderson*, 54 Iowa, 100. A subscription to the stock of a railroad company, payable on the order of the directors in instalments, when the road is completed, is conditional, and the grantee of the first company can not, by performing the condition precedent, fix and make absolute the liability of the subscriber. *Toledo, C. & St. L. R. Co. v. Hinsdale*, (1888) 45 Ohio St. 556.

⁴ *Carlisle v. Cahawba & M. R. Co.*, (1842) 4 Ala. 76. *Cf. White Mountains R. Co. v. Eastman*, (1856) 34 N. H. 134.

recital that the capital stock of the company shall be a certain amount, may render subscriptions thereto conditional upon that amount of stock being taken.¹ So, again, a description of the route of a railway, and mention of the termini thereof, although the language be not conditional, will be construed as an implied condition that the road should be so built, and any material alteration of route or a change of the termini will release the subscriber from payment.² But recitals respecting unimportant matters do not create conditions. For example, a recital that certain subscriptions to the stock of a railway company are to be expended upon a specified portion of the route, has been held to be a mere direction or request as to the manner in which the money should be applied.³ And recitals as to the time within which a railway is to be completed, are not considered to be of the essence of the contract of subscription.⁴

§ 535. Recitals as to the amount of capital stock.—Subscriptions to stock are not deemed to be upon condition precedent that the whole capital of the company shall be paid in.⁵

¹ *Vide supra*, § 108, p. 204, note 1, and *infra*, § 535.

² *Burrows v. Smith*, 10 N. Y. 550; *Caley v. Philadelphia &c. R. Co.*, 80 Pa. St. 363; *Burlington &c. R. Co. v. Whitney*, 43 Iowa, 113; *Buckfield &c. R. Co. v. Irish*, 29 Me. 44; *Oldtown &c. R. Co. v. Veazie*, 39 Me. 579; *Danbury &c. R. Co. v. Wilson*, 22 Conn. 435; *Beach on Railways*, § 109; *Plattsville v. Galena &c. R. Co.*, 43 Wis. 493, holding that if a railway in submitting to a town a proposition for aid, states therein that it has surveyed and located the line through certain sections of the town to a designated point, and solicits aid to build the road "on the route indicated," it will raise an implied condition that the road shall be constructed as indicated. But see *Jewett v. Valley R. Co.*, 34 Ohio St. 601; *Greenville &c. R. Co. v. Johnson*, 8 Baxter, (Tenn.) 332; *White-*

hall &c. R. Co. v. Myers, 16 Abb. Pr. N. S. 34.*

³ *Beach on Railways*, § 95, citing *Lane v. Brainerd*, 30 Conn. 565.

⁴ In such a case there might be an abatement by way of damages if injury had resulted from the delay, but not an entire release from liability. *Kansas City &c. R. Co. v. Alderman*, 47 Mo. 349; *Beach on Railways*, § 95.

⁵ *Sims v. Brooklyn Street R. Co.*, 37 Ohio St. 556; *Wood's Ry. Law*, § 29, citing, among others, *Kennebec &c. R. Co. v. Jarvis*, 34 Me. 360; *York &c. R. Co. v. Pratt*, 40 Me. 447; *Somerset &c. R. Co. v. Cushing*, 45 Me. 524; *Nutter v. Lexington &c. R. Co.*, 6 Gray, 85; *Boston &c. R. Co. v. Wellington*, 113 Mass. 79; *Lexington &c. R. Co. v. Chandler*, 13 Met. 311; *Aronwick R. Co. v. Cady*, 11 R. I. 121; *Hoagland v. Cincinnati &c. R. Co.*, 18 Ind. 452; *Hamilton &c. Plank*

But a recital in the charter, or articles of association, in a prospectus or the contract of subscription, that the capital stock of a company, which at the time has not commenced active operations, shall be a certain amount, is an implied condition that the amount of stock specified, shall be taken before the subscribers shall become liable upon their contracts;¹ un-

Road Co. v. Rice, 7 Barb. 157. See also *In re Jennings*, 1 Irish Ch. 654; *Waterford &c. Ry. Co. v. Dalbiac*, 20 L. J. Ex. 227; *Waterford &c. Ry. Co. v. Dalbiac*, 6 Ex. 443; *Stratford &c. Co. v. Stratton*, 2 Barn. & Ad. 518.

¹*Haskell v. Worthington*, (1888) 94 Mo. 560; *Bray v. Farwell*, 81 N. Y. 600, 608; *Memphis Branch R. Co. v. Sullivan*, 57 Ga. 240; *Templeton v. Lemon*, 112 Ill. 51; *Contoocook Valley R. Co. v. Baker*, 32 N. H. 363; *Rockland M. D. & S. S. Boat Co. v. Sewall*, (1888) 80 Me. 400, where it was held that an agreement, signed by several, to form a corporation under the general statute of Maine, with a certain capital stock, divided into shares, by which each agrees to contribute the sum set against his name, is not an unconditional agreement to take and pay for a certain number of shares of the capital stock when the corporation is formed, and no action can be maintained upon it by the corporation, unless the whole amount of the capital is subscribed and taken, or there is a waiver of such subscription by the subscriber; *Allman v. Havana R. & E. R. Co.*, 88 Ill. 521; *Santa Cruz R. Co. v. Schwartz*, 53 Cal. 106; *New York, H. & N. R. Co. v. Hunt*, 39 Conn. 75; *Hoagland v. Cincinnati & F. W. R. Co.*, 18 Ind. 452; *Topeka B. Co. v. Cummings*, 3 Kan. 55; *Hughes v. Antietam Manuf. Co.*, 34 Md. 332; *Cabot & W. S. B. Co. v. Chapin*, 6 Cush. 50; *Salem Mill Dam Co. v. Ropes*, 6 Pick. 23; s. c. 9 Pick. 187;

Swartwout v. Michigan Air Line R. Co., 24 Mich. 390; *Shurtz v. Schoolcraft & T. R. Co.*, 9 Mich. 269; *Selma, M. & M. R. Co. v. Anderson*, 51 Miss. 829; *Livesey v. Omaha Hotel Co.*, 5 Neb. 50; *Hale v. Sanborn*, 16 Neb. 1; *Fox v. Clifton*, 6 Bing. 776; *Wontner v. Shairp*, 4 C. B. 404, 440; *Norwich Nav. Co. v. Theobald*, 1 Moo. & M. 151; *Pitchford v. Davis*, 5 Mees. & W. *2, in which the recital was in a prospectus. In *Skowhegan & A. R. Co. v. Kinsman*, (1885) 77 Me. 370, it was held that an unconditional promise in a stock subscription to pay for a certain number of shares at par is binding, though the amount of capital stock was not fixed, and the minimum number of shares named in the charter was not subscribed for. *Penobscot R. Co. v. Dummer*, 40 Me. 172; s. c. 63 Am. Dec. 654; *Penobscot &c. R. Co. v. Bartlett*, 12 Gray, 244; *Waterford &c. Ry. Co. v. Dalbiac*, 6 Ex. 443; *Erie &c. R. Co. v. Owen*, 32 Barb. 616; *Boston R. Co. v. Wellington*, 113 Mass. 79; *Stoneham Branch R. Co. v. Gould*, 2 Gray, 277, where it is said: "This is no arbitrary rule. It is founded on a plain dictate of justice, and the strict principles regulating the obligation of contracts;" *Warwick R. Co. v. Cady*, 11 R. I. 131; *Belfast &c. R. Co. v. Cottrell*, 66 Me. 185; *Lewey's Island R. Co. v. Bolton*, 48 Me. 451; s. c. 77 Am. Dec. 236; *Littleton Manuf. Co. v. Parker*, 14 N. H. 543. Cf. *Monroe v. Fort Wayne &c. R. Co.*, 28 Mich. 272; *Hale v. Sanborn*, 16 Neb. 1. See, how-

less a contrary intention appear in the charter, enabling act, articles of association or contract of subscription,¹ as where the agreement is to pay "when required."² Accordingly, where a stock company, incorporated under a general law, requiring that the amount of its stock be stated in the recording certificate, enters into active business with a less capital subscribed than the amount thus stated, a subscriber to the stock, who is not estopped from setting up this fact in defense, can not be held to his subscription.³ So also when the charter has left the amount of the capital stock to be fixed by the corporate authorities, it is a general rule that no subscriber is bound until the amount has been determined and the whole subscribed.⁴ And again, it has been held that subscribers for stock of an incorporated company, whose capital is fixed at a

ever, *Rensselaer &c. Plank R. Co. v. Wetzel*, 21 Barb. 56; *Nelson v. Blakey*, 54 Ind. 29. In seeking to enforce a contract of subscription, the corporation must aver that the full capital stock has been subscribed. *Hain v. North Western &c. R. Co.*, 41 Ind. 196; *Fry v. Lexington &c. R. Co.*, 2 Met. (Ky.) 314. *Contra*, *Lewey's Island R. Co. v. Bolton*, 48 Me. 451; *Lail v. Mt. Sterling &c. R. Co.*, 13 Bush, 34.

¹ *Peoria &c. R. Co. v. Preston*, 35 Iowa, 118; *Musgrave v. Morrison*, 54 Md. 161. Under the Alabama Code of 1886, § 1663, business corporations may organize upon fifty *per cent.* of the capital stock being subscribed. And under this and similar statutes and charters it is not essential to the validity of subscriptions that the whole be taken. *Schloss v. Montgomery Trade Co.*, (1888) 87 Ala. 411; s. c. 13 Am. St. Rep. 51; *Penobscot &c. R. Co. v. Bartlett*, 12 Gray, 244; s. c. 71 Am. Dec. 753; *Schenectady &c. Plank Road Co. v. Thatcher*, 11 N. Y. 102; *Rensselaer &c. Plank Road Co. v. Wetsel*, 21 Barb. 56; *Hoagland v. Cincinnati &c. R. Co.*, 18 Ind. 452; *Hunt v. Kansas &c.*

Co., 11 Kan. 412; *Sedalia &c. Ry. Co. v. Abell*, 17 Mo. App. 645; *Boston &c. R. Co. v. Wellington*, 113 Mass. 79; *Lexington &c. R. Co. v. Chandler*, 54 Mass. 311; *Hanover &c. R. Co. v. Haldeman*, 82 Pa. St. 36.

² *Cheraw &c. R. Co. v. Garland*, 14 S. C. 63; *Illinois River R. Co. v. Zimmer*, 20 Ill. 654; *Jewett v. Valley Ry. Co.*, 34 Ohio St. 601. *Contra*, *Galveston Hotel Co. v. Balton*, 46 Tex. 633. *Cf.* *Kennebec &c. R. Co. v. Jarvis*, 34 Me. 360.

³ *Haskell v. Worthington*, (1888) 94 Mo. 560.

⁴ *Beach on Railways*, § 106; *Troy &c. R. Co. v. Newton*, 74 Mass. 596; *Worcester &c. R. Co. v. Hinds*, 62 Mass. 110; *Pike v. Shore Line*, 68 Me. 445; *Somerset R. Co. v. Clarke*, 61 Me. 384. But for authorities holding that the subscriber is liable although the amount of capital has not been determined, see *Kirksey v. Florida &c. R. Co.*, 7 Fla. 23; s. c. 77 Am. Dec. 426; *City Hotel v. Dickinson*, 72 Mass. 586; *Warwick R. Co. v. Cady*, 11 R. I. 131; *Ward v. Griswoldville Manuf. Co.*, 16 Conn. 593. See *White Mountains R. Co. v. Eastman*, 34 N. H. 124.

certain sum, whose shares are limited to a certain number, and whose charter provides that payment shall be made, as may be determined by the board of directors, can not be compelled to pay until the whole capital has been subscribed for and the board has called for payment, unless it is shown that by their acts they have waived their rights in those regards.¹

§ 536. **The same subject continued.**— General incorporation acts providing that when articles of incorporation are filed and published according to law the incorporators shall be authorized to carry into effect the objects of the corporation, do not abrogate the common-law rule that, where the charter or the terms of subscription do not provide otherwise, payment of a subscription can not be required till the whole capital stock is subscribed; but the subscriber may waive that defense by acts done by him, as stockholder or director, which constitute a part of the business for which the corporation is formed, and which assume it to be ready for business, and evince a willingness to enter upon that business, with the stock already subscribed.² But a person who subscribes a certain amount for the starting of a corporation is not relieved from paying his subscription by the fact that the amount of capital stock provided by a *subsequently adopted* charter is not all taken.³ Nor where a company is already engaged in the prosecution of its business and the subscriber has knowledge of the fact that the whole capital stock has not been taken, is it to be presumed in an action against him by a receiver, that his subscription was conditioned upon the full amount being taken.⁴ And the general rule of the preceding section is seldom applicable where suit is brought by or in behalf of corporate creditors.⁵ When the amount of stock to be subscribed is not fixed by statute, it is usually in the discretion of the commissioners to determine what amount is sufficient.⁶ When the charter prescribes maximum and mini-

¹ *Exposition Ry. & Imp. Co. v. Canal St. E. Ry. Co.*, (La. 1890) 7 So. Rep. 627.

² *Masonic Temple Assoc. v. Chan-nell*, (Minn. 1890) 45 N. W. Rep. 716, construing Minn. Gen. Stat. ch. 34, § 4.

³ *Belton Compress Co. v. Sanders*, (1888) 70 Tex. 699.

⁴ *Musgrave v. Morrison*, 54 Md. 161.

⁵ *Farnsworth v. Robbins*, 36 Minn. 369.

⁶ *Saugatuck &c. Co. v. Westport*, 29 Conn. 337, 348.

minimum limits between which the directors are to fix the capital stock and provides also that assessments be made when the minimum has been subscribed, when that amount has been taken, the subscribers are bound to pay the assessments, although the directors have not determined upon the amount of the full capital stock.¹ But ordinarily the minimum having been subscribed is not sufficient to render the subscriber liable unless that amount has been fixed as the capital.² The articles of association certified by the Secretary of State are *prima facie* evidence as to the amount of capital stock that has been subscribed.³

§ 537. Valid and void conditions.—Conditional subscriptions made prior to the incorporation of a company are void,⁴ but those made after incorporation are valid,⁵ where not contrary to public policy⁶ or inconsistent with the charter or some statute of the State,⁷ or in conflict with the obligations

¹ *White Mountain R. Co. v. Eastman*, 34 N. H. 124; *Penobscot R. Co. v. Bartlett*, 12 Gray, 244; s. c. 71 Am. Dec. 253; *Skowhegan & c. R. Co. v. Kinsman*, 77 Me. 370; *Beach on Railways*, § 106.

² *Pike v. Shore Line*, 68 Me. 445; *Beach on Railways*, § 106. As to what acts of the corporate authorities are equivalent to an express resolution fixing the amount of capital, see *Bucksport & c. R. Co. v. Buck*, 65 Me. 536, a resolution to limit the time of subscription and then close the books; *Lexington & c. R. Co. v. Chandler*, 54 Mass. 311, a resolution to close the books at a certain time; *Penobscot & c. R. Co. v. Bartlett*, 73 Mass. 244; s. c. 71 Am. Dec. 753.

³ *Jewell v. Rock River Paper Co.*, 101 Ill. 57.

⁴ *Troy & B. R. Co. v. Tibbits*, 18 Barb. 297. See also *Chamberlain v. Painesville & H. R. Co.*, 15 Ohio St. 225; *Boyd v. Peach Bottom R. Co.*, 90 Pa. St. 169; *Caley v. Philadelphia & C. C. R. Co.*, 80 Pa. St. 363.

⁵ *New Albany & S. R. Co. v. McCormick*, 10 Ind. 499; *McMillan v. Maysville & L. R. Co.*, 15 B. Mon. (Ky.) 218; *Union Hotel Co. v. Hersee*, 79 N. Y. 454; *Burrows v. Smith*, 10 N. Y. 550; *Morris Canal & Banking Co. v. Nathan*, 2 Hall, (N. Y.) 239; *Ashtabula & N. L. R. Co. v. Smith*, 15 Ohio St. 328.

⁶ *Lake Ontario Shore R. Co. v. Curtiss*, 80 N. Y. 219; *Fort Edward & Fort Miller Plank Road Co. v. Payne*, 15 N. Y. 583; *Macedon & Bristol Plank Road Co. v. Snediker*, 18 Barb. 317; *Butternuts & Oxford Turnpike Co. v. North*, 1 Hill, (N. Y.) 518; *Dix v. Shaver*, 14 Hun, 392. In *Morrow v. Nashville & c. Co.*, (1889) 87 Tenn. 262; s. c. 10 Am. St. Rep. 658, it is said that conditional subscriptions to stock of corporations are contrary to sound public policy, by reason of their tendency to mislead and ensnare creditors, and they ought not, therefore, to be encouraged.

⁷ *Thigpen v. Mississippi & c. R. Co.*, 32 Miss. 347.

which the contract itself imposes upon the subscribers. Ordinarily anything which may be legally done by the corporation may be made a condition to a subscription for stock.¹ Thus subscriptions may be legally conditioned as to the time, manner or means of payment.² A condition that calls shall not be made until a certain amount has been subscribed is valid,³ although the charter may allow operations to commence when a less sum has been subscribed.⁴ But a contract with a subscriber to organization stock of a corporation that for every share subscribed for he shall receive interest-bearing bonds to an equal amount, secured by mortgage on the company's plant, is void, both as to creditors and the corporation.⁵ In New York, where the general turnpike act did not authorize the commissioners to accept conditional subscriptions, it has been held that a subscription conditioned upon a certain location of the road was void as against public policy.⁶ This rule, however, does not seem to have been generally applied to the location of railways.⁷ In other States also conditions in sub-

¹ *Penobscot & K. R. Co. v. Dunn*, 39 Me. 587; *Hanover Junction & C. R. Co. v. Haldeman*, 82 Pa. St. 36; *Ticonic & C. R. Co. v. Long*, 63 Me. 480; *Ashtabula & C. R. Co. v. Smith*, 15 Ohio St. 328; *Milwaukee & C. R. Co. v. Field*, 12 Wis. 340. Cf. *McMillan v. Maysville & C. R. Co.*, 15 B. Mon. 218; s. c. 41 Am. Dec. 181; *New Albany & C. R. Co. v. McCormick*, 10 Ind. 499; s. c. 71 Am. Dec. 337.

² *Smith v. Tallahassee B. P. R. Co.*, 30 Ala. 650; *People v. Chambers*, 42 Cal. 201; *Mitchell v. Rome R. Co.*, 17 Ga. 574; *Statara R. Co. v. Brune*, 6 Gill, 41; *Van Allen v. Illinois Cent. R. Co.*, 7 Bosw. 515; *Highland Turnpike Co. v. McKean*, 11 Johns. (N. Y.) 98; *Milwaukee & N. I. R. Co. v. Field*, 12 Wis. 340.

³ *Union Hotel Co. v. Hersee*, 79 N. Y. 454; *Penobscot & C. R. Co. v. Dunn*, 39 Me. 587; *Ridgefield & C. R. Co. v. Brush*, 43 Conn. 86; *Hanover Junction & C. R. Co. v. Haldeman*,

82 Pa. St. 36; *Philadelphia & C. R. Co. v. Hickman*, 28 Pa. St. 318.

⁴ *Union Hotel Co. v. Hersee*, 79 N. Y. 454.

⁵ *Morrow v. Nashville Iron & Steel Co.*, (1889) 87 Tenn. 262; s. c. 10 Am. St. Rep. 658. In this case the bonds agreed to be issued being secured by mortgage on the plant, which could only be obtained by payment of the capital stock, and the subscriber having become a director without receiving his bonds, the agreement to issue bonds is not a condition precedent, and the stock subscribed stands absolute, though the agreement be void.

⁶ *Beach on Railways*, § 109; *Fort Edward & C. Plank Road Co. v. Payne*, 15 N. Y. 583; *Butternuts & C. Turnpike Co. v. North*, 1 Hill, 518; *Macedon & C. Plank Road Co. v. Snediker*, 18 Barb. 317.

⁷ *Beach on Railways*, § 109; *Lake Ontario & C. R. Co. v. Curtiss*, 80 N. Y. 219; *Cayuga Lake R. Co. v. Kyle*,

scriptions to the stock of railroad companies that the road go by a certain town are valid.¹ And it may be validly stipulated that the location shall be subject to the subscriber's approval.²

§ 538. Secret and separate conditions.—In cases of subscriptions to the stock of corporations accompanied by a secret agreement between the company and the subscriber that the latter shall not be bound by his subscription, or changing in some other respects its ostensible terms, the collateral agreement is held to be void.³ The courts hold the subscriber to the ostensible contract, and permit it to be enforced in an action by the company as the only means of preventing the consummation of the fraudulent scheme and protecting other

5 *Thomp. & C.* 659; *Buffalo &c. R. Co. v. Pottle*, 23 Barb. 21. *Acc.* *Roberts v. Mobile &c. R. Co.*, 32 Miss. 373; *Martin v. Pensacola &c. R. Co.*, 8 Fla. 370; *Nashville &c. R. Co. v. Baker*, 2 Coldw. 574; *McMillan v. Maysville &c. R. Co.*, 15 B. Mon. 218; s. c. 61 Am. Dec. 181; *Henderson &c. R. Co. v. Leavell*, 18 B. Mon. 358; *Charlotte &c. R. Co. v. Blakely*, 3 Strobb. (S. C.) 245; *Spartanburgh &c. R. Co. v. Graffenried*, 12 Rich. (S. C.) 275; *Taggart v. Western Maryland R. Co.*, 24 Md. 563; *Taylor v. Fletcher*, 15 Md. 80; *Missouri Pacific Ry. Co. v. Taggard*, 84 Mo. 264; *Connecticut &c. R. Co. v. Baxter*, 32 Vt. 805; *Fisher v. Evansville &c. R. Co.*, 7 Ind. 407; *Agricultural &c. R. Co. v. Winchester*, 13 Allen, 29; *Caley v. Philadelphia &c. R. Co.*, 80 Pa. St. 363. *Contra*, *Utica &c. R. Co. v. Brinkerhoff*, 21 Wend. 139; s. c. 61 Am. Dec. 220.

¹ *Jacks v. Helena*, 41 Ark. 213; *Moore v. Hanover Junction R. Co.*, 94 Pa. St. 324; *Caley v. Philadelphia &c. R. Co.*, 80 Pa. St. 363; s. c. 80 Am. Dec. 570; *Cumberland Valley R. Co. v. Baab*, 9 Watts, 458; s. c. 36 Am. Dec. 132; *Woonsocket &c. R.*

Co. v. Sherman, 8 R. I. 564; *Paris &c. R. Co. v. Henderson*, 89 Ill. 86; *Wear v. Jacksonville &c. R. Co.*, 24 Ill. 595; *Bucksport &c. R. Co. v. Brewer*, 67 Me. 295; *Jewett v. Lawrenceburgh &c. R. Co.*, 10 Ind. 539; *Evansville &c. R. Co. v. Sharer*, 10 Ind. 246; *Detroit &c. R. Co. v. Starnes*, 38 Mich. 698; *Swartout v. Michigan &c. R. Co.*, 24 Mich. 389; *Cooper v. McKee*, 53 Iowa, 239; *Chamberlain v. Painesville &c. R. Co.*, 15 Ohio St. 225; *Mansfield &c. R. Co. v. Brown*, 26 Ohio St. 223; *Des Moines Valley R. Co. v. Graff*, 27 Iowa, 99; *Burlington &c. R. Co. v. Boestler*, 15 Iowa, 555; *West Cornwall &c. Ry. Co. v. Mowatt*, 15 Q. B. 521.

² *Spartanburgh &c. R. Co. v. Graffenried*, 12 Rich. (S. C.) 275; *North &c. R. Co. v. Winkler*, 29 Mo. 318; *Chamberlain v. Painesville &c. R. Co.*, 15 Ohio St. 225; *Mansfield &c. R. Co. v. Stout*, 26 Ohio St. 241; *Mansfield &c. R. Co. v. Brown*, 26 Ohio St. 224; *Des Moines &c. R. Co. v. Graff*, 27 Iowa, 99; *Robert's Case*, 3 De Gex & Sm. 205; s. c. 2 Mac. & G. 196; *Beach on Railways*, § 109.

³ *Meyer v. Blair*, (1888) 109 N. Y. 600; s. c. 4 Am. St. Rep. 500.

subscribers and creditors.¹ The doctrine that an agreement between one subscriber to the stock of a corporation and the company, made concurrently with the making of the subscription, which purports to annul its obligation or materially limit and change the liability of the subscriber to the detriment of the company, is invalid and void, is founded upon the principle that a subscription to the stock of a corporation whose stock is open for general subscription, is not only an undertaking between each subscriber and the company, but between him and all other subscribers to the common enterprise; and that each subscriber has the right to suppose that the subscription of every other subscriber is a *bona fide* undertaking according to its terms.² Their respective subscriptions are contributions or advances for a common object. The action of each in his subscription may be supposed to be influenced by that of the others, and every subscription to be based on the ground that the others are what, upon their face, they purport to be.³ So that where the condition is not secret and other subscribers are not thereby misled, it may be relied on by the subscriber as valid,⁴ except as against corporate creditors in the event of

¹ *Meyer v. Blair*, (1888) 109 N. Y. 600; s. c. 4 Am. St. Rep. 500, 503; *White Mountains R. Co. v. Eastman*, 24 N. H. 124; *Phoenix &c. Co. v. Badger*, 6 Hun, 293; s. c. affirmed 67 N. Y. 294; *Graff v. Pittsburg &c. R. Co.*, 31 Pa. St. 489; *Robinson v. Pittsburg &c. R. Co.*, 33 Pa. St. 334; s. c. 72 Am. Dec. 792; *Downie v. White*, 10 Wis. 176; s. c. 78 Am. Dec. 736; *Crawford v. Pittsburgh &c. R. Co.*, 32 Pa. St. 141. If persons sign the subscription book of a corporation, leaving the amount blank, intending that they shall be represented as subscribers for the purpose of influencing others, as to creditors seeking to recover unpaid subscriptions, such persons impliedly authorize the filling up of the blanks by those taking the subscriptions. *Jewell v. Rock River Paper Co.*, 101 Ill. 57. But where a person made a conditional parol subscription and

wrote his name upon a blank sheet of paper and the secretary of the company afterwards without his knowledge subscribed the name to an unconditional contract of subscription, it did not render the subscriber liable upon the latter contract. *Tonica &c. R. Co. v. Stein*, 21 Ill. 96. *Cf. Bucher v. Dillsburg &c. R. Co.*, 76 Pa. St. 306.

² *Meyer v. Blair*, (1888) 109 N. Y. 600; s. c. 4 Am. St. Rep. 500, 503, 504; *Graff v. Pittsburgh &c. R. Co.*, 31 Pa. St. 489; *Miller v. Hanover Junction &c. R. Co.*, 87 Pa. St. 489; s. c. 30 Am. Rep. 349; *Melvin v. Lamar Ins. Co.*, 80 Ill. 446; s. c. 22 Am. Rep. 199.

³ *White Mountains R. Co. v. Eastman*, 34 N. H. 124.

⁴ *White Mountains R. Co. v. Eastman*, 34 N. H. 124. One subscribed to bank stock on condition that at the end of a certain period, if he

the company becoming insolvent.¹ And there is nothing illegal in an agreement between the subscribers themselves that at the end of a year they would take the shares off the hands of one of their number, if at that time he wished to sell, there being no actual fraud and the relations between that subscriber and the company being unaffected by his agreement with the other subscribers.² If there be no evidence as to when the condition was made it will be presumed to have been made at the time of subscribing.³ It can not be subsequently annexed without the consent of all the parties in interest.⁴ The issuing by agreement of the stockholders of false certificates of paid-up stock is no ground for one of the subscribers, a party to the agreement, to have his subscription set aside.⁵

§ 539. Performance of conditions.—The performance of conditions annexed to contracts of subscription being the consideration upon which they depend, the subscriber does not

wished, he could return the stock, and receive back the note he had given in payment. The note contained the same stipulation, and the other stockholders thus having notice of the condition could not claim to have been deceived nor to be released from their contracts. *Jones v. Johnson*, (1888) 86 Ky. 530. And a written agreement separate from the contract of subscription, containing a covenant to return the money received if the road were not located along a certain route, has been held to be enforceable. *Frankfort &c. Turnpike Co. v. Churchill*, 6 Mon. 427.

¹ *Winston v. Brooks*, (1889) 129 Ill. 64; s. c. 6 Ry. & Corp. L. J. 150, where it was held that one who subscribes to the capital stock of a corporation solely in order to enable it to obtain a certificate of organization, under an agreement with the other subscribers that he is not to be liable on the stock, and is not to be required to pay assessments thereon, is not liable to an assessment on the

stock as against the other subscribers, until it becomes necessary to assess it in order to pay debts of the corporation.

² *Meyer v. Blair*, (1888) 109 N. Y. 600; s. c. 4 Am. St. Rep. 500. So in *Morgan v. Struthers*, (1889) 131 U. S. 246, it was held that an agreement by the incorporators of a company to take the shares of one of the subscribers, and refund his money if he should demand it within a fixed time, is valid, there being no design to deceive or defraud any one, though none of the subscriptions were to be paid in until the stock was all reliably subscribed, and the other subscribers neither made such an agreement as to their stock, nor were aware that the one in question was made.

³ *Robinson v. Pittsburgh &c. R. Co.*, 32 Pa. St. 334; *Wood's Ry. Law*, § 30.

⁴ *New Hampshire Central R. Co. v. Johnson*, 30 N. H. 390.

⁵ *Goff v. Hawkeye Pump & Windmill Co.*, 62 Iowa, 691.

become a member of the corporation nor liable to pay for his shares until the conditions have been fulfilled.¹ A subscriber is entitled to notice of the performance of the condition, and until notice is given a general call does not apply to conditional subscribers.² All of several conditions must be performed before calls can be made;³ but if one part of the subscription be free from condition it may be collected independently.⁴ Whether the conditions have been fully performed is a question of fact for the jury,⁵ the allegation of performance,⁶ and burden of proof being upon the company.⁷ To bind the other party, the company must perform the conditions imposed within a reasonable time.⁸ Upon its so doing

¹ *Montpelier &c. R. Co. v. Langdon*, 46 Vt. 284; *Philadelphia &c. R. Co. v. Hickman*, 28 Pa. St. 318; *Monadnock R. Co. v. Felt*, 52 N. H. 379; *Ashtabula &c. R. Co. v. Smith*, 15 Ohio St. 328; *Burrows v. Smith*, 10 N. Y. 550; *Chase v. Sycamore &c. R. Co.*, 38 Ill. 215; *McMillan v. Maysville &c. R. Co.*, 15 B. Mon. 218; s. c. 61 Am. Dec. 181; *Evansville &c. R. Co. v. Shearer*, 10 Ind. 244.

² *Chase v. Sycamore &c. R. Co.*, 38 Ill. 215. *Contra*, *Spartanburg &c. R. Co. v. De Graffenreid*, 12 Rich. 275; *Nichols v. Burlington &c. R. Co.*, 4 Greene, 42.

³ *Porter v. Raymond*, 53 N. H. 519.

⁴ *St. Louis &c. R. Co. v. Eakins*, 30 Iowa, 279.

⁵ *St. Louis &c. R. Co. v. Eakins*, 30 Iowa, 279; *Toledo &c. R. Co. v. Johnson*, 49 Mich. 148; *Jewett v. Lawrenceburg &c. R. Co.*, 10 Ind. 539. But see *Brand v. Lawrenceville Branch R. Co.*, (1888) 77 Ga. 506, where it was held to be for the court to decide whether a condition that a certain contract should be made, had been fulfilled by an agreement in writing which was alleged to be a compliance therewith. Performance may be proven by parol, (*St. Louis &c. R. Co. v. Eakins*, 30

Iowa, 279) or by the corporate records. *Penobscot &c. R. Co. v. Dunn*, 39 Me. 587. *Contra*, *Philadelphia &c. R. Co. v. Hickman*, 28 Pa. St. 318. But a certificate of the directors that a condition has been performed within a certain time may be impeached by evidence to the contrary. *Morris &c. Co. v. Nathan*, 2 Hall, 239.

⁶ *Roberts v. Mobile &c. R. Co.*, 32 Miss. 373; *Henderson &c. R. Co. v. Leavell*, 16 B. Mon. 358.

⁷ *Union Hotel Co. v. Hersee*, 15 Hun, 371; *Santa Cruz R. Co. v. Schwartz*, 53 Cal. 106; *People v. Holden*, 82 Ill. 93; *Chase v. Sycamore &c. R. Co.*, 38 Ill. 215; *Ridgefield &c. R. Co. v. Reynolds*, 46 Conn. 375; *Monadnock R. Co. v. Felt*, 52 N. H. 379; *Bucksport &c. R. Co. v. Buck*, 65 Me. 536; *Pittsburgh &c. R. Co. v. Hickman*, 28 Pa. St. 318.

⁸ *Blake v. Brown*, (Iowa, 1890) 45 N. W. Rep. 751, where fourteen years was considered an unreasonable time for completing a railway, *Stevens v. Corbitt*, 33 Mich. 458; *Chartiers R. Co. v. Hodgins*, 85 Pa. St. 507; *Chicago &c. R. Co. v. Schewe*, 45 Iowa, 79. But see *Johnson v. Kessler*, (1889) 76 Iowa, 411, where the failure of a railroad com-

the consideration relates back and the promise of the subscriber at once becomes obligatory.¹ If the condition itself relates to the time within which the company is to do certain things, the contract ceases to bind the subscriber upon the limitation therein fixed.²

§ 540. **Substantial performance.**—A substantial rather than a literal, or nominal, performance of conditions annexed to contracts of subscription, is what is required by the courts.³ Thus it has been held that a railway company is not to be held strictly to the day upon which it undertook to complete or set its road in operation.⁴ So also, if a railway route as located conform substantially to the one described in the charter or contract, the condition will not be considered to be broken by slight deviations,⁵ except as to subscribers especially affected thereby.⁶ The same principle is applied to conditions respecting *termini* of railways.⁷ And again, it has

pany to perform its part of a contract as to the time of the completion of its road was held not to release stockholders from their subscription.

¹ Des Moines Valley R. Co. v. Graff, 27 Iowa. 99; Tower v. Detroit &c. R. Co., 34 Mich. 328.

² McCully v. Pittsburgh &c. R. Co., 32 Pa. St. 25; Ticonic &c. Co. v. Long, 63 Me. 480; Memphis &c. R. Co. v. Thompson, 24 Kan. 170; Portland &c. R. Co. v. Inhabitants of Hartford, 58 Me. 23; Burlington &c. R. Co. v. Boestler, 15 Iowa, 555.

³ Des Moines Valley R. Co. v. Graff, 27 Iowa, 99; Paris &c. R. Co. v. Henderson, 89 Ill. 86; Springfield Street Ry. Co. v. Sleeper, 121 Mass. 29; O'Neal v. King, 3 Jones, (N. C.) 517; Virginia &c. R. Co. v. County &c., 8 Nev. 68; Ogden v. Kirby, 79 Ill. 555. *Contra*, Martin v. Pensacola &c. R. Co., 8 Fla. 370, 390; s. c. 73 Am. Dec. 713, where a strict compliance is said *obiter* to be necessary.

⁴ Des Moines Valley R. Co. v. Graff, 27 Iowa, 99, where there was a delay

of more than two months; Missouri Pacific Ry. Co. v. Taggard, 84 Mo. 264.

⁵ Cayuga Lake R. Co. v. Kyle, 5 Thomp. & C. 569.

⁶ Moore v. Hanover Junction R. Co., 94 Pa. St. 324; Crane v. Indiana &c. Ry. Co., 59 Ind. 165. But where there is no express condition with respect to location of the road, and the charter confers upon the company the authority to change its location, a subscriber can not be released from his contract because the private advantage which would have accrued to him from the proximity of the line to his property has been lost by the change. Beach on Railways, §§ 109-111; Fry v. Lexington &c. R. Co., 2 Met. (Ky.) 314; Delaware R. Co. v. Thorp, 1 Houst. (Del.) 149; Bauct v. Alton &c. R. Co., 13 Ill. 504.

⁷ People v. Holden, 82 Ill. 93. In Stowell v. Stowell, 45 Mich. 364, a promissory note, payable to the treasurer of the Chicago & Canada Southern Railway Company, was

been held that, so long as a railway be completed, it is immaterial to the subscriber whether it was constructed by the company to which he gave his subscription or by a corporation succeeding to the rights and franchises of the former.¹ But the location of a depot just beyond the limits of a town is not a sufficient compliance with a condition that it be located "within the limits."²

§ 541. Non-performance.—When a company has undertaken to perform conditions annexed to a contract of subscription to its capital stock, unforeseen difficulties, such for example as floods preventing the completion of a railway within the time fixed, do not release it from its obligation.³ And when non-performance results from a change in the plans of the company, after the subscribers have made partial payments upon their shares, they may be released from their contracts and may recover the amounts paid in.⁴ But if it is through some act or default of the subscriber himself that performance is prevented, the company is released.⁵

§ 542. Waiver of performance.—Waiver of conditions annexed to contracts of subscription can not be presumed from mere silence.⁶ But giving a promissory note in payment,

made "in consideration of the construction of" the railway through or within half a mile of the village of Dundee "within three years after this date, and the building of a passenger and freight depot" at Dundee; payable "in thirty days after said road and depot are constructed as aforesaid." The articles of incorporation of the company named Chicago as one of the *termini*. The track was laid through Dundee, and the depot put up, but instead of extending the road to Chicago it was connected with other routes at the point beyond Dundee, so as to form a through line; and it was held that the promise was made to afford aid in constructing the road, and was intended to be payable in case of the completion, as agreed, of the portion

built, regardless of the failure to extend it to Chicago within three years as stipulated. But see Cooper v. McKee, 52 Iowa, 239; Lawrence v. Smith, 57 Iowa, 701, as examples of material non-compliance with conditions as to *termini*.

¹ Detroit &c. R. Co. v. Starnes, 38 Mich. 698; Michigan &c. R. Co. v. Bacon, 33 Mich. 466.

² Davenport &c. R. Co. v. O'Connor, 40 Iowa, 477. Cf. Courtright v. Strickler, 37 Iowa, 382.

³ Jewett v. Lawrenceburgh &c. R. Co., 10 Ind. 539.

⁴ Jewett v. Lawrenceburgh &c. R. Co., 10 Ind. 539.

⁵ Upton v. Hansbrough, 3 Biss. 417, 423.

⁶ Bucksport &c. R. Co. v. Inhabitants of Bremer, 67 Me. 295; Burling-

which makes no mention of the conditions upon which the subscription was made,¹ payment of the whole of the subscription,² acting as judge of an election held by the corporation,³ serving as a director of the company,⁴ or as president,⁵ in conjunction with silence respecting the conditions upon which subscriptions were made, is considered to be a waiver of the company's performance. The fact, however, that notwithstanding the terms of the contract, the subscriber paid the full price for part of the stock, does not establish his liability to pay in like manner for the rest, and is not evidence of an agreement on his part to pay without call.⁶ Under an Ohio statute permitting a change of location by a railroad company on consent of the stockholders, provided that "any subscription of stock made on the faith of the location of such railroad, . . . upon any line abandoned by such change, shall be cancelled at the written request of the subscriber not having assented," it is held that a subscriber who expressly stipulates against a change, does not waive his right to enforce that condition by failing to make the request.⁷ Laches will bar the remedy by injunction to restrain a change of route.⁸

ton &c. R. Co. v. Boestler, 15 Iowa, 555. Cf. Hanover Junction &c. R. Co. v. Haldeman, 82 Pa. St. 36.

¹ Slipher v. Earhart, 83 Ind. 173; Evansville &c. R. Co. v. Dunn, 17 Ind. 603; O'Donald v. Evansville &c. R. Co., 14 Ind. 259; Chamberlain v. Painesville &c. R. Co., 15 Ohio St. 225. Cf. Woonsocket Union R. Co. v. Sherman, 8 R. I. 564. But see Taylor v. Fletcher, 15 Ind. 80, and Parker v. Thomas, 19 Ind. 213, where the notes were fraudulently obtained.

² Parks v. Evansville &c. R. Co., 23 Ind. 567.

³ Pittsburgh &c. R. Co. v. Proudfit, 2 Pittsb. 85.

⁴ Lane v. Brainerd, 30 Conn. 565. But election to office without entering upon the duties thereof does not operate as a waiver. Ridgefield &c. R. Co. v. Reynolds, 46 Conn. 375.

⁵ Dayton &c. R. Co. v. Hatch, 1 Disney, 84.

⁶ Grosse Isle Hotel Co. v. FAnson, 43 N. J. L. 442. So generally partial payments made without knowing that the condition has not been performed, or in reliance upon false assurances of officers of the company that it has been performed, are not to be deemed a waiver of the condition. Pittsburgh &c. R. Co. v. Stewart, 41 Pa. St. 54; Jewett v. Lawrenceburgh &c. R. Co., 10 Ind. 539; Morris &c. Co. v. Nathan, 2 Hall, 239; Somerset &c. R. Co. v. Cushing, 45 Me. 524; Oldtown &c. R. Co. v. Veazie, 39 Me. 571; Ridgefield &c. R. Co. v. Brush, 43 Conn. 86.

⁷ Railway Co. v. Fisher, 39 Ohio St. 330.

⁸ Chapman v. Mad River &c. R. Co., 6 Ohio St. 119.

§ 543. **Fraudulent agreements.**—Agreements between prospective subscribers to the proposed stock of a corporation, which are fraudulent in their nature, can not be enforced. Thus an agreement that the subscription shall merely be nominal for the purpose of inducing others to subscribe is invalid.¹ And a secret agreement entered into between the directors of a corporation and a subscriber for shares in its capital stock, that he may within a specified time reduce the number of shares thus subscribed for, the subscription being held out as *bona fide* for the full amount, in order to induce others to become subscribers, is void, as a fraud upon the other subscribers; and the original subscription may be enforced for its full amount between the corporation and the subscriber.² It may be laid down generally, that a party may be concluded from denying his own acts or admissions, which were expressly designed to influence the conduct of another, and did so influence it; and when his denial will operate to the injury of the latter.³ So also agreements that the subscription shall be merely a pledge of stock by the corporation to the subscriber,⁴ or that the subscriber shall not be liable for the par

¹ Mann v. Cooke, 20 Conn. 178; Galena & S. W. R. Co. v. Ennor, 116 Ill. 55; s. c. 12 Am. & Eng. Corp. Cas. 88; Peychaud v. Hood, 23 La. Ann. 732; Wetherbee v. Baker, 35 N. J. Eq. 501; Phoenix Warehousing Co. v. Badger, 6 Hun, 293; Robinson v. Pittsburgh & C. R. Co., 32 Pa. St. 334; Graff v. Pittsburgh & S. R. Co., 31 Pa. St. 489; Centre & K. Turnpike Co. v. McConaby, 16 Serg. & R. 140; "Subscriptions to the Capital Stock of Corporations," by James M. Kerr, (1889) 6 Ry. & Corp. L. J. 422. A person sued for installments due on his subscription will not be allowed to defeat a recovery by showing that he attached a secret oral condition to the delivery of his subscription to the promoter. Minneapolis Threshing Machine Co. v. Davis, (1889) 40 Minn. 110; s. c. 12 Am. St. Rep. 701; Connecticut & P. Rivers R. Co. v. Bai-

ley, 24 Vt. 465; Downie v. White, 12 Wis. 176; Davidson's Case, 3 De G. & S. 21. See Litchfield Bank v. Church, 29 Conn. 137; New Albany & S. R. Co. v. Slaughter, 10 Ind. 218; Chouteau Ins. Co. v. Floyd, 74 Mo. 286; Bates v. Lewis, 3 Ohio St. 459; Blodgett v. Morrill, 20 Vt. 509; Minor v. Mechanics' Bank, 1 Peters, 46; Preston v. Grand Collier Dock Co., 11 Sim. 327; s. c. 2 Eng. R. & Canal Cas. 335; Mangles v. Grand Collier Dock Co., 10 Sim. 519; s. c. 2 Eng. R. & Canal Cas. 360; Bridger's Case, L. R. 9 Eq. 74.

² White Mountains R. Co. v. Eastman, 34 N. H. 124, quoted in Jewett v. Valley Ry. Co., 34 Ohio, 601, 609. Cf. Field on Corporations, § 90.

³ Hall v. Selma & T. R. Co., (1844) 6 Ala. 741, 745, per Collier, C. J., citing Tipton v. Selma & T. R. Co., 5 Ala. 787.

⁴ Melvin v. Lamar Ins. Co., 80 Ill.

value of his stock,¹ or that the subscriber shall be released, or that the stock may be surrendered, are invalid.² Thus, if one subscribe for the capital stock of a corporation under a parol promise by the agent who procures the subscription that the subscriber shall not be called upon to pay for the stock or respond to any assessment, he is nevertheless bound.³ And again, an agreement entered into between prospective subscribers to the capital stock of a corporation, that they alone shall take the stock in the company when organized, is a contract which can not be enforced.⁴

§ 544. Irregular subscriptions — Variation from statutory form.—The intention to subscribe is a question of fact for the jury.⁵ When the statute does not prescribe a fixed mode of making a subscription to the capital stock of a corporation, any contract of subscription, which is good at common law, is valid under the statute.⁶ The courts look to the intention of the contracting parties rather than to the manner in which that intention is manifested.⁷ If the manner of

446; *White Mountains R. Co. v. Eastman*, 34 N. H. 124.

¹*Union Mut. Life Ins. Co. v. Frear Stone Manuf. Co.*, 97 Ill. 397; *Custar v. Titusville Gas & Water Co.*, 63 Pa. St. 381; *Upton v. Tribilcock*, 91 U. S. 45.

²*Gill v. Baliss*, 72 Mo. 424; *Melvin v. Lamar Ins. Co.*, 80 Ill. 446; *White Mountains R. Co. v. Eastman*, 34 N. H. 124; "Subscriptions to the Capital Stock of Corporations," by James M. Kerr, (1889) 6 Ry. & Corp. L. J. 422.

³*Chouteau Ins. Co. v. Floyd*, 74 Mo. 286.

⁴*Lake Ontario Shore R. Co. v. Curtiss*, 80 N. Y. 219; *Poughkeepsie & S. P. Plank Road Co. v. Griffin*, 24 N. Y. 150; *California Sugar Manuf. Co. v. Schafer*, 57 Cal. 396; *Stowe v. Flagg*, 72 Ill. 397; *Chase v. Sycamore & C. R. Co.*, 38 Ill. 215; *Mt. Sterling Coalroad Co. v. Little*, 14 Bush, 429; *Goff v. Winchester College*, 6 Bush, 443; *Perkins v. Union*

B. H. & E. Mach. Co., 12 Allen, 273; *Sewall v. Eastern R. Co.*, 19 Cush. 5; *Carlisle v. Saginaw Valley & St. L. R. Co.*, 27 Mich. 315; *Dayton W. B. & X. Turnpike Co. v. Coy*, 13 Ohio St. 84; *Strasburg R. Co. v. Echternacht*, 21 Pa. St. 220; *Pittsburgh & S. R. Co. v. Gazzam*, 32 Pa. St. 340; *Charlotte & S. C. R. Co. v. Blakely*, 3 Strobb. 245; *Wallingford Manuf. Co. v. Fox*, 12 Vt. 304.

⁵*Philadelphia & C. R. Co. v. Cowell*, 28 Pa. St. 329; s. c. 70 Am. Dec. 128; *Galveston & C. Co. v. Bolton*, 46 Texas, 683.

⁶*Buffalo & Jamestown R. Co. v. Gifford*, 87 N. Y. 294.

⁷*Dutchess & C. R. Co. v. Mabbett*, 58 N. Y. 379; *Boston & C. R. Co. v. Wellington*, 113 Mass. 79; *Fry v. Lexington & C. R. Co.*, 2 Met. (Ky.) 314; *Mexican Gulf & C. R. Co. v. Viavant*, 6 Rob. (La.) 305; *Oler v. Baltimore & C. R. Co.*, 41 Md. 583; *Wellersburg & C. Co. v. Young*, 12 Md. 476; *Oakes v. Turquand*, L. R. 2 H. L. 325.

making subscriptions is prescribed by the charter or general incorporating act, every material mandatory provision thereof must be substantially complied with, to effect a complete contract binding upon the parties.¹ But all that is required is a substantial *bona fide* compliance with the statute.² Where the paper as a whole clearly indicates what was the intention of the parties, many irregularities and defects are held to be immaterial, and the contract will not be rendered void by reason of these slight departures from the statutory form.³ For example, subscriptions upon separate sheets of paper, or in private memorandum books, instead of in the book which the statute provides for, have been held to be valid and binding.⁴

¹ *Dutchess &c. R. Co. v. Mabbett*, 58 N. Y. 379; *Troy &c. R. Co. v. Tibbits*, 18 Barb. 297; *Troy &c. R. Co. v. Warren*, 18 Barb. 310; *Pittsburgh &c. R. Co. v. Gazzam*, 32 Pa. St. 340; *Carlisle v. Saginaw &c. R. Co.*, 27 Mich. 315.

² *Buffalo &c. R. Co. v. Gifford*, 87 N. Y. 294; *Ashtabula &c. R. Co. v. Smith*, 15 Ohio St. 328; *People v. Stockton &c. R. Co.*, 45 Cal. 306; *Harris v. McGregor*, 29 Cal. 124; *Brownlee v. Ohio &c. R. Co.*, 18 Ind. 68.

³ *Peninsular &c. R. Co. v. Duncan*, 28 Mich. 130; *Birmingham &c. R. Co. v. Locke*, 1 Q. B. 256; *London &c. Ry. Co. v. Fairclough*, 2 Man. & G. 674.

⁴ *Iowa & M. R. Co. v. Perkins*, 28 Iowa, 281; *Mexican Gulf R. Co. v. Viavant*, 6 Rob. (La.) 305; *Ashtabula & N. L. R. Co. v. Smith*, 15 Ohio St. 328; *Hamilton & D. P. R. Co. v. Rice*, 7 Barb. 157; *Clark v. Continental Improvement Co.*, 57 Ind. 135; *Boston B. & G. R. Co. v. Wellington*, 113 Mass. 79; *St. Charles Manuf. Co. v. Britton*, 2 Mo. App. 290; *Clements v. Todd*, 1 Ex. 268; *Brownlee v. Ohio I. & I. R. Co.*, 18 Ind. 68; *Buffalo & J. R. Co. v. Gifford*, 87 N. Y. 294; *Stuart v. Valley R. Co.*, 32 Gratt. 146. In

Woodruff v. McDonald, 33 Ark. 97, the loose sheets were afterwards bound together in a volume and made a part of the records of the company. *Acc. Troy &c. R. Co. v. Tibbits*, 18 Barb. 297; *Troy &c. R. Co. v. Warren*, 18 Barb. 310; *Poughkeepsie & Salt Point R. Co. v. Griffin*, 24 N. Y. 150; *In re Dutchess & Columbia Co. R. Co.*, 58 N. Y. 397; *Ashtabula &c. R. Co. v. Smith*, 15 Ohio St. 328; *Iowa &c. R. Co. v. Perkins*, 28 Iowa, 281. *Cf. Hawley v. Upton*, 102 U. S. 314; *Bucher v. Dillsbury &c. R. Co.*, 76 Pa. St. 306; "Subscriptions to the Capital Stock of Corporations," by James M. Kerr, (1889) 6 Ry. & Corp. L. J. 422. But it is said by the United States circuit court in the case of *McClelland v. Whiteley*, 11 Biss. C. C. 444; s. c. 15 Fed. Rep. 322, that one can not be held liable as a stockholder of a company, until his name has been signed by himself, or his authorized agent, in the book of the company kept for that purpose; and that writing one's name in a private memorandum book of a party soliciting subscriptions to the capital stock of the company, is not of itself authority to that person to sign a subscription for shares.

Where duplicate sets of articles are used for the purpose of obtaining subscriptions, and only one set is properly filed in the office of the Secretary of State, the subscribers to the paper not so filed, do not become members of the corporation, and are not liable on their subscriptions.¹ Where the statute requires the termini of railways to be stated in the articles of association, the incorrect designation of them will not vitiate the contract, provided the road be otherwise sufficiently described.² It is essential that an irregularly made subscription be accepted by the company.³

§ 545. **Waiver of irregularities.**—While a subscription should be in writing and in accordance with the statutory form, if one be prescribed, there are nevertheless many cases in which the liabilities incident to a regularly made subscription have been imposed by implication of law.⁴ Thus serving as a director of a company is an implied subscription for the necessary qualification shares.⁵ So, too, accepting and holding certificates of stock,⁶ and selling or transferring the shares,⁷

¹ *Erie & N. Y. City R. Co. v. Owen*, 32 Barb. 616.

² *Cayuga &c. R. Co. v. Kyle*, 64 N. Y. 185; *Boston &c. R. Co. v. Wellington*, 113 Mass. 79; *Burlington &c. R. Co. v. Palmer*, 42 Iowa, 222.

³ *Parker v. Northern &c. R. Co.*, 33 Mich. 23.

⁴ *Philadelphia &c. R. Co. v. Cowell*, 28 Pa. St. 329; s. c. 70 Am. Dec. 128; *Wheeler v. Millar*, 90 N. Y. 353; *Phoenix &c. Co. v. Badger*, 67 N. Y. 294; s. c. 6 Hun, 293; *Dorris v. French*, 4 Hun, 292; *Hamilton &c. Co. v. Rice*, 7 Barb. 159; *Kansas City Hotel Co. v. Hunt*, 57 Mo. 126; *Upton v. Tribilcock*, 91 U. S. 45; *Sanger v. Upton*, 91 U. S. 56; *Cheltenham &c. Ry. Co. v. Daniell*, 2 Q. B. 781; *Cromford &c. Ry. Co. v. Lacey*, 3 Younge & J. 80.

⁵ *In re Englefield Colliery Co.*, 8 Ch. Div. 388; *De Ruvigne's Case*, 5 Ch. Div. 306, 322; *Pearson's Case*, 5 Ch. Div. 336; *McCoy's Case*, 2 Ch.

Div. 1; *Portal v. Emmens*, 1 C. P. Div. 201, 664; *Hay's Case*, L. R. 10 Ch. 393; *Luke's Case*, L. R. 6 Ch. 469. The mere publication, however, of a person's name as one of a board of directors, without his assent and without his participating in the management of the affairs of the corporation, does not estop him to deny that he is a shareholder in an action against him by creditors of the corporation. *Hume v. Commercial Bank*, 9 Lea, 728.

⁶ *Hamilton &c. Co. v. Rice*, 7 Barb. 157; *Lane v. Brainard*, 30 Conn. 565; *Upton v. Tribilcock*, 91 U. S. 45; *In re South Mountain &c. R. Co.*, 7 Sawy. 30; *McLoughlin v. Detroit &c. R. Co.*, 8 Mich. 100; *Inter-Mountain &c. Co. v. Jack*, 5 Mont. 568. *Cf. Clarke v. Continental &c. Co.*, 57 Ind. 135, 138.

⁷ *Everhart v. Westchester &c. R. Co.*, 28 Pa. St. 339, where no cash deposit had been made.

attending and voting at corporate meetings, either in person or by proxy,¹ paying calls² or paying for one of the shares irregularly taken,³ accepting dividends⁴ or acting as a director,⁵ operate to estop a person from denying the regularity and validity of an alleged subscription.⁶ And in general any defense to the subscriber's liability may be considered as waived by acquiescence or delay after discovery of the facts,⁷ or by any act indicating a clear intent to abide by the contract or to pass over an objection thereto which might have been made.⁸

§ 546. Effect of legislation upon subscription agreements. Non-essential irregularities in the subscription may be cured by legislative enactment.⁹ The extension by the legislature of the time allowed by a railroad company's charter in which

¹ *Duffield v. Barnum &c. Co.*, (1887) 64 Mich. 293; *Erie &c. Plank Road v. Brown*, 25 Pa. St. 156; *Buffalo &c. R. Co. v. Gifford*, 87 N. Y. 294; *Rockville &c. Co. v. Van Ness*, 2 Cranch, C. C. 449. But see *Stewart's Case*, L. R. 1 Ch. App. 574; *McCully v. Pittsburg &c. R. Co.*, 32 Pa. St. 25.

² *Maltby v. Northwestern &c. R. Co.*, 16 Md. 422; *Mississippi &c. R. Co. v. Harris*, 36 Miss. 17; *Inter-Mountain Publishing Co. v. Jack*, 5 Mont. 568.

³ *Bell's Appeal*, (1887) 115 Pa. St. 88.

⁴ *Duffield v. Barnum &c. Co.*, (1887) 64 Mich. 293. *Contra*, *Philadelphia &c. R. Co. v. Cowell*, 28 Pa. St. 329; s. c. 70 Am. Dec. 128, where demanding a dividend was not considered a waiver.

⁵ *Weinman v. Wilkesburgh &c. Ry. Co.*, (1898) 118 Pa. St. 192; *Rice v. Rock Island &c. R. Co.*, 21 Ill. 93; *Hunt v. Kansas &c. Co.*, 11 Kan. 412; *Meadow v. Gray*, 30 Me. 547.

⁶ But see *Stewart's Case*, L. R. 1 Ch. App. 574, where merely attending meeting, and *Philadelphia R. Co. v. Cowell*, 28 Pa. St. 329, where demanding a dividend, and *Greenville &c. R. Co. v. Coleman*, 5 Rich.

L. 118, and *McCully v. Pittsburgh &c. R. Co.*, 32 Pa. St. 25, where voting by proxy, were not considered acts sufficient to amount to a waiver.

⁷ *Cf. Schwanck v. Morris*, 7 Rob. (N. Y.) 658; *State v. Jefferson Turnpike Co.*, 3 Humph. (Tenn.) 305; *City Bank v. Bartlett*, 71 Ga. 797; *Sharpley v. Louth &c. Ry. Co.*, 2 Ch. Div. 663; *Ehrlanger v. Sombrero &c. Co.*, 3 App. Cas. 1218; *Peel's Case*, L. R. 2 Ch. App. 674; *Ashley's Case*, L. R. 9 Eq. Cas. 263; *Heyman v. European Central Ry. Co.*, L. R. 7 Eq. Cas. 154.

⁸ *Chubb v. Upton*, 95 U. S. 665; *Ogilvie v. Knox Insurance Co.*, 22 Hun, 380; *City Bank v. Bartlett*, 71 Ga. 797; *Chaffin v. Cummings*, 37 Me. 76; *Ex parte Briggs*, L. R. 1 Eq. Cas. 486; *Scholey v. Central Ry. Co.*, L. R. 9 Eq. 266, n.; *Ayres' Case*, 25 Beav. 513; *May v. Memphis Branch R.*, 48 Ga. 109; *McCully v. Pittsburg &c. R. Co.*, 32 Pa. St. 25.

⁹ *Rice v. Rock Island &c. R. Co.*, 21 Ill. 93; *Clark v. Monongahela Navigation Co.*, 10 Watts, 364. *Contra*, *New York &c. R. Co. v. Van Horn*, 57 N. Y. 473; *Richmond &c. Co. v. Clarke*, 61 Me. 351.

to build the road will not release the subscribers to stock.¹ Where at the time a contract of subscription was made under an agreement that payment should be made in property, the laws of the State permitted contracts of that character, but subsequently, before the organization of the company, a change in the code of the State required payments of subscriptions to be made in money, it was held that the subscription, not having been accepted by the company before it had become illegal, could not be enforced.² But a statute in respect of subscriptions to the stock of companies, not prescribing the form in which they shall be made, does not invalidate a contract of that character which would be valid at common law.³ A subsequent reduction of the capital stock by the legislature to the amount actually subscribed can not relieve prior subscriptions from the implied condition that the full amount originally fixed be taken.⁴ The legislature may impart validity to a municipal subscription made without its authority, provided it would have had power in the first instance to authorize it,⁵ unless special remedial legislation of this character be prohibited by the constitution of the State.⁶

¹ *Jacks v. Helena*, 41 Ark. 213.

² *Knox v. Childersburg Land Co.*, (1889) 86 Ala. 180.

³ *Buffalo & Jamestown R. Co. v. Gifford*, 87 N. Y. 294.

⁴ *Oldtown &c. R. Co. v. Veazie*, 39 Me. 571.

⁵ *Grenada County v. Brogden*, 112 U. S. 261; *Anderson v. Santa Anna*, 116 U. S. 365; *Thompson v. Perrine*, 106 U. S. 589; *National Bank v. Yankton Co.*, 101 U. S. 129; *Thompson v. Lee County*, 3 Wall. 377; *Beloit v. Morgan*, 7 Wall. 619; *St. Joseph v. Rogers*, 16 Wall. 663; *Cooper v. Thompson*, 13 Blatchf. 434; *Perrine v. Thompson*, 17 Blatchf. 18; *Horton v. Thompson*, 7 Hun. 452; *Rogers v. Smith*, 5 Hun. 475; *Duanesburgh v. Jenkins*, 57 N. Y. 188, where the court said: "As it might have authorized action in this way and on these conditions by the town originally, I see no objection to giv-

ing effect to its ratification of the action of the town, and holding its consent thus expressed effectual." *Acc. Williams v. Duanesburgh*, 66 N. Y. 129; *People v. Mitchell*, 35 N. Y. 522; *Gelpecke v. Dubuque*, 1 Wall. 253; *Dows v. Town of Elmwood*, 34 Fed. Rep. 114; *Leslie v. Urbana*, 2 Biss. 435; *Duanesburgh v. Jenkins*, 57 N. Y. 188, restricting *People v. Batchellor*, 53 N. Y. 131, to the circumstances of that particular case. *Cf. Hays v. Holly Springs*, 114 U. S. 120; *Bolles v. Town of Brimfield*, 120 U. S. 759. The decisions in the United States Supreme Court to the contrary, (see *Elmwood v. Morey*, 92 U. S. 289) do not express the prevailing doctrine of the court, but simply follow the decisions of the appellate court in the State in which the case arose. *Wood's Railway Law*, § 113, note.

⁶ *Horton v. Thompson*, 71 N. Y. 520;

§ 547. **Effect of consolidation.**—A consolidation of one corporation with another releases dissenting subscribers who agreed to take shares at a time when consolidation was not authorized either by the charters of the companies or by some existing statute, and it is immaterial that the union may be authorized by a subsequent amendment of the charters or by a statute thereafter enacted.¹ The fact that the consolidated company bears the same name as the original company does not change this rule.² Even though consolidation may have been authorized at the time the subscription contract was made, a dissenting subscriber can not be held liable thereon, if the effect of the consolidation is to work a material alteration in the original purpose for which the company was formed.³ It is not necessary that the subscribers' consent be expressly given. It may be presumed from such acts as taking stock in the new corporation formed by the consolidation.⁴ By a converse rule to the general doctrine, the consolidated company can not release a subscriber to one of the original companies from his liability to corporate creditors by acquiescing in a devise whereby he seeks to evade it.⁵

§ 548. **Failure of consideration.**—If a subscription be induced by promises on the part of the corporation which it fails to fulfil, the contract is not enforceable, since there is held to be a failure of consideration.⁶ Thus where a railway

Gaddis v. Richland County, 92 Ill. 114; *William v. Roberts*, 88 Ill. 11; *Marshall v. Selliman*, 61 Ill. 218; *Richland County v. People*, 3 Bradw. 210.

¹ *Illinois &c. R. Co. v. Cook*, 29 Ill. 237; *Lauman v. Lebanon Val. R. Co.*, 30 Pa. St. 42; *Gardner v. Hamilton*, 33 N. Y. 421; *Midland &c. Ry. v. Leech*, 3 H. L. 872; *Cook &c. R. Co. v. Paterson*, 18 C. B. 414; *Shelbyville &c. Turnpike Co. v. Barnes*, 42 Ind. 498; *State v. Bailey*, 16 Ind. 46; s. C. 79 Am. Dec. 405; *Harshman v. Bates County*, 92 U. S. 569; *Martin v. Junction R. Co.*, 12 Ind. 605; *McCray v. Junction R. Co.*, 9 Ind. 356; *Bish v. Johnson*, 21 Ind. 299;

Hanna v. Cincinnati &c. R. Co., 20 Ind. 30; *Sprague v. Illinois River R. Co.*, 19 Ill. 174; *Bishop v. Brainerd*, 28 Conn. 289. *Cf.* *Mansfield &c. R. Co. v. Stout*, 26 Ohio St. 241; *Illinois River R. Co. v. Zimmer*, 20 Ill. 654.

² *Shelbyville &c. Co. v. Barnes*, 42 Ind. 498.

³ *Illinois Grand Trunk R. Co. v. Cook*, 29 Ill. 237.

⁴ *Fisher v. Evansville &c. R. Co.*, 7 Ind. 407.

⁵ *Bouton v. Dement*, (1887) 123 Ill. 142.

⁶ *Burrows v. Smith*, 10 N. Y. 550. *Cf.* *Kennedy v. Panama &c. Co.*, L. R. 2 Q. B. 580.

company, by a promise of collateral securities, induced a party to subscribe to a road it proposed to build, and, after part payment on the subscription, placed the collaterals beyond the reach of the subscribers, in violation of the original agreement, he was declared relieved from his obligations.¹

§ 549. Withdrawal and abandonment.—A subscriber who for a long period has failed to pay his subscription or to exercise the rights of a member of the company, may be treated by it as having abandoned his connection therewith.² But it is seldom that the company takes the initiative in the cancellation of subscriptions. It is generally the subscriber who seeks to sever his relations with the corporation; and it has been said that he may do this at any time before the organization of the company has been completed.³ Thus prior to the

¹ *Reusense, Mexican National Construction Co.*, 22 Fed. Rep. 522.

² *Perkins v. Union & Co.*, 12 Allen, 273. *Cf. Evans v. Smallcombe*, L. R. 3 H. L. 249. La. Civil Code, art. 3506, (3472,) declaring that three years' possession in good faith of a movable—which corporate stock is declared to be, Civil Code, art. 474, (466)—is sufficient to give good title, does not apply to a suit brought by a stockholder against a corporation to compel it to replace in his name certain shares of stock alleged to have been negligently canceled, and the certificates therefor unlawfully issued to a third person; the defendant in such case never having been in possession of the stock. *St. Romes v. Levee Steam Cotton-Press Co.*, (1888) 127 U. S. 614.

³ *Gaff v. Flescher*, 33 Ohio St. 107; *Garrett v. Dillsburg & M. R. Co.*, 78 Pa. St. 465; *Holt v. Winfield Bank*, 25 Fed. Rep. 812; *Cook v. Chittenden Bank*, 25 Fed. Rep. 544. See *Rose v. San Antonio & M. G. R. Co.*, 31 Tex. 49; *Tillsonburg R. Co. v. Goodrich*, 8 Ont. Q. B. Div. 565. Where one signs a subscription

paper, entirely misunderstanding the nature of the agreement, he may obtain release from the obligations thereby incurred. *County of Schuylkill v. Copley*, 67 Pa. St. 386; *Smith v. Reese & Co.*, L. R. 2 Eq. 264. *Cf. Rockford & C. Co. v. Schunick*, 65 Ill. 223. One induced to subscribe through fraud may upon discovery thereof recover money paid by him on his subscription in an action for money had and received. *Atkinson v. Pocock*, 12 Jur. 60; *Woutner v. Shairp*, 4 C. B. 404; *Jarrett v. Kennedy*, 6 C. B. 319. Or the subscriber may wait until an action at law has been brought against him by the corporation to enforce payment of his subscription and then set up by way of defense any valid cause for the illegality of the contract; or he may file his bill in equity to restrain such suit at law and to set aside the contract and to recover back payments; or, where his defense is founded upon fraud, he has also his action for damages against the parties making the misrepresentations. *Paddock v. Fletcher*, 42 Vt. 389.

date of filing of the certificate from which the incorporation of the company dates under the New York General Railroad Act of 1850, a promoter who retains possession thereof may erase or alter his subscription thereto notwithstanding his having induced others to subscribe.¹ But the better opinion is thought to be that in those cases where a subscription is made with full knowledge of the purpose and scope of the undertaking, and has been acted upon either by the corporation, or by other subscribers, it is irrevocable.² Accordingly, the consent of all the other subscribers is necessary to effect a valid cancellation of a subscription contract;³ and in America, if the affairs of the company have become involved, the consent of creditors, whose equities have intervened, is also requisite to render the cancellation valid.⁴ This rule grows out of the American doctrine that the subscriptions are a trust fund for the security of corporate creditors and does not prevail in England. Accordingly, in that country, the consent of the company alone is required.⁵ While the directors have authority

¹ Beach on Railways, § 129, citing *Burt v. Farrar*, 24 Barb. 518.

² See *New Albany & S. R. Co. v. McCormick*, 10 Ind. 499; *Hughes v. Antietam M. Co.*, 34 Md. 316; *Hutchins v. Smith*, 46 Barb. 235; *Gulf, C. & S. F. R. Co. v. Neely*, 64 Tex. 344; *Kidwelly Canal Co. v. Raby*, 2 Price, 93. But see *Payson v. Withers*, 5 Biss. 269, holding that the subscriber can not plead that he was ignorant of the true condition of the affairs of the corporation.

³ *Robinson v. Pittsburgh & C. R. Co.*, 32 Pa. St. 334; s. c. 72 Am. Dec. 772; *Zirkel v. Joliet & C. Co.*, 79 Ill. 334; *Ryder v. Alton & C. R. Co.*, 13 Ill. 516; *White Mountains R. Co. v. Eastman*, 34 N. H. 124; *Jewett v. Valley Ry. Co.*, 34 Ohio St. 601; *Burke v. Smith*, 16 Wall. 390; *New Albany v. Burke*, 11 Wall. 96; *Bedford R. Co. v. Bowser*, 48 Pa. St. 29. Thus a receiver can not compromise subscriptions except by leave of court when all the stockholders are

parties to the action. *Chandler v. Brown*, 77 Ill. 333. Cf. *Pearson's Case*, L. R. 7 Ch. 309. In a Pennsylvania case the defendant had been active in soliciting subscriptions for the building of a railroad, having taken a book from its agent, subscribed therein himself and persuaded others to subscribe, and after keeping the book for about six months, by reason of a disagreement with the company's agent about the payment for his services, cut his name out of it and returned it to the company, and it was held that he could not thus cancel his contract but was liable for the amount of his subscription. *Green v. Chartiers Ry. Co.*, 96 Pa. St. 391; s. c. 42 Am. Rep. 548. Acc. *Railroad Co. v. White*, 10 S. C. 155. Cf. *Jewett v. Valley R. Co.*, 34 Ohio St. 601.

⁴ *Coffin v. Ransdell*, (1887) 110 Ind. 417.

⁵ *In re Drönfield & C. Co.*, 17 Ch. Div. 76.

to compromise claims based upon subscription contracts where it is doubtful whether any benefit would accrue to the company from attempting to enforce them by legal proceedings,¹ this power of compromise must not be extended to cancel a contract which the company could clearly enforce.² And whatever be the general powers of the directors in respect of the corporate affairs, they can not cancel these contracts unless authority to do so be expressly conferred upon them.³ If they do so, they incur personal liability to the company for their unauthorized act.⁴

§ 550. Substitution of subscribers.—It seems that the substitution of one subscriber to the capital stock of a corporation for another subscriber therefor, can only be accomplished by the erasure of the name of the original subscriber, with the consent of the commissioners, and the substitution of another name.⁵ Otherwise the corporation is not bound to recognize the new party or to issue a certificate of stock to him.⁶

§ 551. Specific performance — Damages.—As has been said above, the possession of a stock certificate is not neces-

¹ *Philadelphia & C. R. Co. v. Hickman*, 28 Pa. St. 318. Thus where a subscriber for two hundred shares agrees with the directors to pay for one hundred, and be released from further liability, and thereafter the company voluntarily dissolves, and a new one takes its place, which under a provision allowing holders of paid-up stock in the old company the same number of shares in the new, credits the subscriber on its subscription list with one hundred shares paid up, the new company's stockholders are estopped to attack the original compromise. *Whitaker v. Grummond*, (1888) 68 Mich. 249; s. c. 70 Mich. 635.

² *Adam's Case*, L. R. 13 Eq. 474.

³ *Robinson v. Pittsburgh & C. R. Co.*, 32 Pa. St. 334; s. c. 72 Am. Dec. 772; *In re Dronfield & C. Co.*, 17 Ch. Div. 76; *Richmond's Case*, 4 Kay & J. 305; *Burke v. Smith*, 16 Wall.

390; *Thomas' Case*, L. R. 13 Eq. 474; *Teasdale's Case*, L. R. 9 Ch. 54; *Wright's Case*, L. R. 12 Eq. 334; *Colville's Case*, 48 L. J. Ch. 633.

⁴ *Bank v. St. John*, 25 Ala. 566; *Hodgkinson v. National Co.*, 26 Beav. 473.

⁵ *Selma & T. R. Co. v. Tipton*, 5 Ala. 787; *Ryder v. Alton & S. R. Co.*, 13 Ill. 516. See *Hawley v. Upton*, 102 U. S. 314; "Subscriptions to the Capital Stock of Corporations," by James M. Kerr, (1889) 6 Ry. & Corp. L. J. 422.

⁶ *Hawkins v. Mansfield G. Min. Co.*, 52 Cal. 513; *Morrison v. Gold Mountain G. M. Co.*, 52 Cal. 306; *Coleman v. Spencer*, 5 Blackf. (Ind.) 197. Cf. *Chater v. San Francisco S. F. Co.*, 19 Cal. 219; *Baltimore City P. R. Co. v. Sewell*, 35 Md. 238; *State v. Crescent City G. L. Co.*, 24 La. Ann. 315; *Hunt v. Gunn*, 13 C. B. (N. S.) 226; *Tempest v. Kilner*,

sary to the ownership of shares;¹ but if the company refuse without just cause to issue a certificate to a subscriber who, while the corporation is still a going concern, tenders the amount due and demands the certificate, he will be thereby released from liability upon his contract, even as against corporate creditors.² It is conceivable, however, that the subscriber may not desire to be released from his contract, that the enterprise may have proven successful and that he may seek specific performance of the contract on the part of the company,³ or damages for his exclusion from the benefits resulting from the successful prosecution of the business. There are circumstances under which a bill in equity to enforce specific performance of the contract will be sustained;⁴ but where an allotment of stock has been disregarded by the company and the shares issued to different persons, the original allottees

3 C. B. 249. Cf. "Purchase of Chance of an Allotment of Shares," 17 Co. Ct. Chr. 77.

¹ *Vide* cases cited *supra*, § 62; and also New Albany &c. R. Co. v. McCormick, 10 Ind. 499; s. c. 71 Am. Dec. 337, n.; Buffalo &c. R. Co. v. Dudley, 14 N. Y. 336, 347; Mitchell v. Beckman, 64 Cal. 117. But see York v. Passaic Rolling Mill Co., (1887) 30 Fed. Rep. 471, where the defendant company having drawn up a certificate of stock to plaintiff, which it retained in the stock-book, and indorsed thereon a receipt by defendant for plaintiff, it was held that the certificate was never delivered so as to confer any rights thereunder on plaintiff.

² Potts v. Wallace, 33 Fed. Rep. 272. Under the eighth section of the Mo. Act of 1851, p. 268, amendatory of the special act of the Missouri legislature of March, 1849, incorporating the Missouri Pacific Railroad, which provides that, when payment for the shares of any subscriber shall be fully made, the president, etc., shall deliver certificates for the amount of stock belonging to

him, no certificates can be demanded by a subscriber until the whole subscription is paid. Spurlock v. Missouri Pac. Ry. Co., (1887) 90 Mo. 199.

³ As to measure of damages in such cases, see Van Allen v. Illinois &c. R. Co., 7 Bosw. 515; Baltimore &c. Ry. Co. v. Sewall, 35 Md. 238. Where mines were conveyed to defendant in trust to organize a joint-stock company to develop them, the grantors to receive in consideration therefor a proportion of the stock of the company after a certain amount of it had been set aside for a working capital, it was held that when the company was organized, and the stock had been set apart for the working capital, the grantors at once became entitled to their shares, and could not be made to wait until the stock set apart for working capital was actually sold; that the defendant held the stock in trust for such grantors, and that the statute of limitations could not begin to run. Philes v. Hickles, (Arizona, 1888) 18 Pacif. Rep. 595, annotated.

⁴ Ferguson v. Wilson, L. R. 2 Ch. 77.

can not enforce specific performance if the injury resulting to them can be adequately compensated for by a judgment at law for money damages,¹ and the usual remedy is by an ac-

¹ In a recent case the complainants alleged that they and certain other persons agreed to organize a corporation for the purpose of operating mines; that afterwards they organized a mining company, adopted by-laws, and elected officers; that at a regular meeting of the corporation it was agreed that the capital stock should be divided among the different members thereof, complainants to receive a certain number of shares. Subsequently complainants were induced to resign from the board of directors in order to let in other investors; they being promised that their interests should remain the same. Thereafter they were excluded from the meetings, and denied all information of the affairs of the corporation. A new distribution of stock was made, the original distribution being disregarded, and the shares of stock which had been allotted to complainants were allotted to others. They prayed: "That the said corporation called and known as the 'Fronteriza Silver Mining & Milling Company,' by and through its proper officers, may be compelled to deliver to your orator Robert L. Summerlin, 11,750 shares of stock in said corporation, and to your orator George F. Lupton 15,000 shares of the stock of said corporation, being in the aggregate 26,750 shares allotted to your orators by said corporation at its organization, or, if that can not be done, by reason of the sale, transfer, hypothecation, misappropriation, or any other disposition of the said shares of stock, that an account may be taken, by and under the direction of this honorable court, concerning all the corporate dealings

and transactions in and about the sale, transfer, hypothecation or misappropriation of the said shares of stock allotted to or agreed to be distributed to your orators, and how much was realized therefrom, and what, if anything, was due to your orators, and what dividends have been declared or profits made from the sale of silver ore or bullion; and that whatever may be found due to your orators on account of the said 26,750 shares of stock, and a proportionate share of all dividends and profits and products may be decreed to your orators, together with costs; and that your orators shall have such other and further relief as the nature of their case may require, and to your honors shall seem meet." To this bill the defendant company and C. E. Lyman demurred. The court sustained the demurrer and held that their allegations did not show any contract on the part of the company as a corporation, nor that in its corporate capacity had it taken part in the alleged wrongful acts, and it could not be made a party defendant to an action to compel the issue to the complainants of the shares of stock originally allotted to them, or for damages in case such shares could not be issued. *Summerlin v. Fronteriza Silver & Co.*, (1890) 41 Fed. Rep. 249, s. c. 7 Ry. & Corp. L. J. 451, 456, where Pardee, J., said: "Complainants' whole cause of action seems to be that the contract to give them shares was violated, and that they have been damaged thereby; and their right to recover, if they can recover at all, seems to be limited to a money decree, making a case where a com-

tion in *assumpsit*.¹ But to maintain an action against the company for the value of the shares the facts must clearly show a contract between the parties,—on the one hand, a definite offer to take, and on the other, an acceptance of the subscription.² Where the original allottees have no community

plete remedy at law can be had, for the damages can be as well ascertained at law as in equity. See *Buzard v. Houston*, 119 U. S. 347, and the cases there cited."

¹ *Wyman v. American Powder Co.*, 8 Cush. 168; *Finley & Co. v. Kurtz*, 34 Mich. 89. *Cf. Swazy v. Choate & Co. Co.*, 48 N. H. 200.

² In *Eldred v. Bell Telephone Co.*, (1887) 119 U. S. 513, it appeared that in 1879 the plaintiff undertook to acquire the right to operate telephone exchanges in Kansas City and St. Louis. He was to secure the rights of the Kansas City Telephone Exchange and the American District Telegraph Company of St. Louis. Accordingly, he organized the defendant company, taking in four friends as stockholders. Before their stock was delivered, an arrangement was effected for the consolidation of the American District Telegraph Company with defendant, the former receiving two hundred and fifty shares of the stock of the latter. These shares were deducted from shares of stock previously allowed to plaintiff, who had charge of and directed all these transactions; but subsequently sued the defendant on an implied contract for the reasonable worth of the two hundred and fifty shares. It was held, however, that there was no contract, the allotting of the two hundred and fifty shares to the American District Telegraph Company being simply a new arrangement in the creation of defendant and distribution of its stock, and not

a contract between defendant and plaintiff for stock of that amount. In *Thurber v. Crump*, (1888) 86 Ky. 408, the plaintiff had contracted with another to assist in selling his patent-right, and was to receive for his services half of the amount realized above a specified sum. In payment for the right, certain corporate stock was to be issued to the owner of the right. And it was held that performance of the contract by plaintiff would merely make him a creditor of the owner and did not confer on him any title to the stock when issued. In a well-considered Pennsylvania case, the plaintiff agreed to put money in a proposed corporation, certain security to be given him, and he to be superintendent for five years. He subsequently agreed to take corporate stock to hold as security, with the option of purchasing it out of the dividends; each share to be transferred as paid for. After serving two years as superintendent, he resigned. Each year he demanded a settlement, and transfer of the stock due him. And it was held that he exercised his option in purchasing the stock, and that it was not affected by his resignation. *Appeal of Goodwin Gas Stove & Meter Co.*, (1888) 117 Pa. St. 514; s. c. 2 Am. St. Rep. 696. In a Florida case the plaintiff in equity complained that, although he had been an original incorporator of a certain railroad company, the directors thereof had ignored him in the distribution of stock, and had distributed all the stock among other persons. There

or privity of interest, not being stockholders in the defendant company, the contract with each complainant being separate, there being no privity in the consideration, a demurrer to the complaint on the ground of misjoinder of complainants will be sustained.¹ The company can not specifically enforce in equity a preliminary contract of subscription made before its incorporation, since it can not be considered a party thereto, but it may bring an action at law to recover damages for its breach.²

§ 552. The Statute of Limitations.—There is some conflict of authority as to the time when the statute of limitations begins to run upon contracts of subscription to the capital stock of corporations. There is one line of cases holding that some adverse action on the part of the company or of the representative of its creditors, such as a call by the directors or by the assignee under authority of court, is necessary to set the statute in motion.³ A second line of cases holds that

was no evidence that the persons to whom it was distributed had not regularly subscribed for the stock, nor was there evidence of bad faith or fraud, although plaintiff charged both. It was held that the plaintiff showed no rights in the premises, and that it was nothing to him that the company was about to acquire, under the terms of its charter, possession of lands granted by the State on certain conditions that had been complied with, he showing no interest therein except as aforesaid. *Brown v. Florida Southern Ry. Co.*, 19 Fla. 472.

¹*Summerlin v. Fronteriza Silver Mining & Milling Co.*, 41 Fed. Rep. 249; s. c. 7 Ry. & Corp. L. J. 451.

²*Thrasher v. Pike County &c. R. Co.*, 25 Ill. 393; *Rhey v. Ebensburg &c. R. Co.*, 27 Pa. St. 261. *Cf.* *Mt. Sterling &c. R. Co. v. Little*, 14 Bush, 429; *Ottawa &c. R. Co. v. Black*, 79 Ill. 93.

³*Scoville v. Thayer*, 105 U. S. 155; *Van Hook v. Whitlock*, 3 Paige Ch.

(N. Y.) 409; s. c. 26 Wend. 43; s. c. 37 Am. Dec. 246; *Nimmo v. Walker*, 14 La. Ann. 581; *Salsbury v. Black*, 6 Harr. & J. (Md.) 293; *Quigg v. Kittridge*, 18 N. H. 137; *Sinkler v. Indiana &c. Turnpike Co.*, 3 Pa. St. 149; *Walter v. Walter*, 1 Whart. (Pa.) 292; *Thompson v. Reno Savings Bank*, (1885) 19 Nev. 171; s. c. 3 Am. St. Rep. 881, where the court said: "It was a continuing liability of the subscribers, which neither the indulgence of the trustee nor mere lapse of time could defeat. The statute of limitation is not available as a defense, because it has not been set in motion by any adverse action, such as a call by the corporation upon appellant to pay his subscription;" *Western R. Co. v. Avery*, 64 N. C. 489; *Curry v. Woodward*, 53 Ala. 376; *Taggart v. Western Maryland R. Co.*, 24 Md. 563. *Cf.* *Appeal of Mack*, (Pa. 1886) 7 Atlan. Rep. 481, not officially reported. *Acc.* The "Glenn Cases" of Georgia, Virginia, Maryland and Alabama, cited *infra*,

an act of insolvency on the part of the company renders the obligation of the subscribers to pay absolute and that, accordingly, the statute begins to run from that time.¹ A third line of authorities holds that if a call be not made within the time barring action upon contracts of like character, the company is to be presumed to have abandoned the contract.² These lines of authorities are not to be confounded with cases in which creditors of the company seek to enforce the personal liability of shareholders under the statutes which in some States impose this additional liability upon them. The former is a liability *ex contractu*, while the latter is one created by law, and, in respect of the time of accrual, depends upon the wording of the several statutes under which it exists.³

§ 554. In this line of cases the statute is considered as running from the time the call is due and payable. *Curry v. Woodward*, 53 Ala. 376; *Glenn v. Williams*, 60 Md. 93; *Baltimore &c. Turnpike Co. v. Barnes*, 6 Harr. & J. 57.

¹ *Glenn v. Dorsheimer*, 23 Fed. Rep. 695; s. c. 24 Fed. Rep. 536, where it is said that the statute begins to run within a reasonable time after an assignment for the benefit of creditors. In Pennsylvania, it begins to run upon a subscription to the capital stock of a corporation, which afterwards becomes insolvent, from the date of its assignment for the benefit of creditors, and not from the time of a call for the unpaid balance of such subscription. *Franklin Sav. Bank v. Bridges*, (Pa. 1887) 8 Atl. Rep. 611.

² Where a condition precedent to bringing action exists, as where a call is a condition precedent to bringing action on subscription, the condition must be performed within a reasonable time, and certainly not after the period within which an action could be maintained. *Morrison v. Mullin*, 34 Pa. St. 17; *Girard Bank v. Bank of Penn Township*, 39 Pa. St. 102; *Allibone*

v. Hagar, 46 Pa. St. 54; *Rhines v. Evans*, 65 Pa. St. 195; *Robinson v. Pittsburgh &c. R. Co.*, 32 Pa. St. 334. "We hold, therefore, that the company were bound to demand payment of the subscription within six months from its date—or at least, to call in an installment within that period. And this in strict analogy to the statute; for, whether the demand be an essential preliminary to the action or not, it is beyond question one of the remedies given to the company upon the contract. The statute in terms bars only the action. But we ground a presumption on the statute, that a party who did not employ the other means afforded for enforcing the contract within the period of the statute meant to abandon the contract. After that period demand could not be made with effect. *Pittsburgh & Connellsville R. Co. v. Byers*, (1858) 32 Pa. St. 22; s. c. 72 Am. Dec. 770, 772. *Cf. Custar v. Titusville G. & W. Co.*, 63 Pa. St. 387.

³ Thus the cause of action against the stockholders of a corporation by creditors, to enforce the stockholder's individual liability under the Alabama statute, does not accrue until dissolution, and the statute of limit-

When the statute of limitations has barred an action upon the contract by the corporation, the creditors are likewise barred from enforcing payment of subscription.¹ But this, of course, is not the rule as to the statutory liability. The shareholders are not, however, to be charged with the pay-

actions then begins to run. *McDonnell v. Alabama Gold Life Ins. Co.*, (1889) 85 Ala. 401. *Acc. Garesche v. Lewis*, 93 Mo. 197. Under another statute it is held that in a suit to collect a judgment against an insolvent corporation from a stockholder thereof, the statute of limitations does not commence to run against the judgment creditor and in favor of the stockholder until the entry of the judgment. *Powell v. Oregonian Ry. Co.*, (1889) 38 Fed. Rep. 187. In a California case the defendants were sued as stockholders for an indebtedness contracted by a company. Code Civil Proc. Cal. § 359, limits the time for bringing such an action to three years after the discovery by the aggrieved party of the facts upon which the liability was created. And it was held that if the plaintiffs desired to rely on the stockholders it was incumbent upon them to examine the books of the company to discover how the stock stood, and that, as the books of the company were open to inspection by the plaintiffs, they would be charged with that knowledge which could have been ascertained by such inquiry, and that the time commenced to run when the debt was incurred. The liability of a stockholder for a debt of a corporation is a liability "created by law," referred to in Code Civil Proc. Cal. § 359, which enacts that an action to enforce a liability created by law must be brought within three years after the discovery of the facts upon which the liability was created.

Moore v. Boyd, (1887) 74 Cal. 167. Sometimes there is a provision that the action must have been commenced by the creditors against the corporation within a given limited time after the maturity of the debt, in order to hold the share-owner on his statutory liability. New York Laws of 1848, ch. 40, § 24; *Shelling-ton v. Howland*, (1873) 53 N. Y. 371; *Birmingham National Bank v. Mosser*, (1878) 14 Hun. 605; *Lindsley v. Simonds*, 2 Abb. Prac. (N. S.) 69. Cf. *State Savings Association v. Kellogg*, (1873) 52 Mo. 583. But failure to sue a corporation organized under New York Laws of 1848, ch. 40, within one year after the debt becomes due, as required by section 24 of that act, to entitle the creditor to sue the stockholders, under section 10, on their unpaid subscriptions, is excused by the dissolution of the corporation within the year after the debt becomes due. *Arnot v. Sage*, (1889) 5 N. Y. Supl. 447. The charter of a manufacturing and mining corporation made the stockholders liable for debts of the corporation payable in one year from the time when they should be contracted, if sued against the corporation within a year. Notes were given by the corporation, and paid as they matured, by giving new notes, and it was held that the year began to run from the maturity of the original notes, not from the maturity of the substituted notes. *Union Bank v. Wando Mining & Manuf. Co.*, 17 S. C. 339.

¹ *Stephenson v. Ware*, 45 Cal. 110.

ment of debts due to the corporate creditors who neglect to appear and prove their claims.¹

§ 553. *The same subject continued.*— Whether equity will follow the law in applying the statute of limitations to subscriptions of stock is doubtful,—certainly not when it would “have a manifestly inequitable and unjust operation.”² Thus where a party bought stock of a corporation, relying in good faith upon false and fraudulent statements of its officers, and afterwards attended meetings of stockholders by proxy and in person, and voted to increase the capital, and received a dividend, and approved the action of the directors, not discovering the fraud, or commencing proceedings to rescind his purchase, till the company had become insolvent and attachments had been filed against it, and then tendered back his dividend and brought action for his purchase money just before an assignment was made for the benefit of the corporate creditors, he was held to be estopped from recovery by his conduct and laches, by reason of which the rights of the creditors represented by the assignee and receiver became superior to his.³ But of course a subscription to stock which has been obtained by fraudulent representations on the part of the promoters of the corporation, who afterwards became directors thereof, may be annulled by the subscriber, if he rescinds promptly and before the rights of creditors or subsequent stockholders have accrued.⁴ Where a subscription to the stock of a manufacturing corporation is claimed to have

¹ *Richmond v. Irons*, 131 U. S. 27.

² *Duffield v. Barnum Wire & Iron Works*, (1887) 64 Mich. 293; *Terry v. Bank of Cape Fear*, 20 Fed. Rep. 777; *Scoville v. Thayer*, 105 U. S. 143, 155. In *Payne v. Bullard*, 23 Miss. 88; s. c. 55 Am. Dec. 74; the statute was declared to have no application in equitable actions to enforce payment of subscriptions; so also in *Hightower v. Thornton*, 8 Ga. 486; s. c. 52 Am. Dec. 412. A purchaser of preferred stock issued without express statutory authority, who voluntarily subscribed and paid for it for the purpose of promoting the

scheme under which it was issued, and who was a promoter of the scheme, can not hold it for twenty-eight months after the conditions upon which it was issued have been fulfilled, and then, on the insolvency of the company, assert the invalidity of the stock and recover back his money. *Bard v. Banigan*, (1889) 39 Fed. Rep. 13. *Contra*, *Bank of United States v. Dallam*, 4 Dana, 574.

³ *Duffield v. Barnum Wire & Iron Works*, (1887) 64 Mich. 293.

⁴ *McDermott v. Harrison*, (1890) 9 N. Y. Supl. 184.

been obtained by false representations, and a resolution is passed by the board of directors cancelling the subscription, and under the resolution the subscribers return to the company their stock certificates, four years' acquiescence by the corporation in the action of the board operates as a ratification thereof, even though it was *ultra vires*.¹ The statute of limitations does not begin to run against the creditors' right to object to an issue of stock below par until they have brought suit against the corporation upon the debts owing them and have recovered judgment.² A subscriber who has availed himself of the statute, even as to a part of his subscription, can not, without payment, claim a certificate of stock; for the statute of limitations, although it bars the remedy, does not pay the debt.³ The Wisconsin statute, which prohibits any action from being maintained against a corporation after its dissolution, or against its stockholders after the expiration of three years from the date of an assignment made by it for the benefit of creditors, is limited to cases where the corporation expires by its own limitation, or is dissolved voluntarily, or is annulled by forfeiture or otherwise, and does not apply to cases where the corporation has simply ceased to do business for want of funds.⁴

§ 554. The same subject continued — The Glenn Cases.— It has been held that where an insolvent corporation ceases to do business and assigns all its property, including unpaid stock subscriptions, the liability of its stockholders at once becomes absolute, and the statute of limitations begins to run in their favor.⁵ But it is held in Georgia that the statute does not begin to run against the assignee until a call has been made by him, either under a power conferred upon him in the deed of assignment or under a decree of a court of equity.⁶ The

¹ McDermott v. Harrison, (1890) 9 N. Y. Supl. 184.

² Christensen v. Quintard, 36 Hun, 334.

³ Johnson v. Albany &c. R. Co., 54 N. Y. 416, 426.

⁴ Sleeper v. Goodwin, (1887) 67 Wis. 579, construing Wis. Rev. Stat. of 1878, § 1764.

⁵ Glenn v. Dorsheimer, 23 Fed. Rep. 695, *per* Brewer, J.

⁶ Glenn v. Howard, (1889) 81 Ga. 383; s. c. 12 Am. St. Rep. 818, where commenting upon Judge Brewer's decision in the case above cited, the court said: "This is the only decision to the contrary that we have been able to find directly upon the ques-

supreme court of Virginia, in a similar suit, involving the same question, held that the statute did not begin to run until after the call was made under the decree above referred to.¹ The supreme court of Maryland, when the question came before it, held to the same effect.² The supreme court of Alabama, in a case involving the same question, likewise held that the statute of limitations did not begin to run until the call was made.³

tion. Other cases have been referred to by learned counsel who argued the case, which seem to look in that direction; and I must say for myself that there is a great deal of reason in favor of the decision of Judge Brewer; but the weight of authority is unquestionably against the ruling of the court below in this case." In a suit brought by a stockholder, against the corporation, seeking an injunction to prevent waste, and asking for a receiver, a receiver was appointed, and the order contained these words: "And, if there shall be any sums due upon the shares of the capital stock of said company, the said receiver will proceed to col-

lect and recover the same, unless the persons from whom the said sums may be due shall be wholly insolvent, and for this purpose may prosecute actions," etc. It was held that the authority intended to be conferred was merely to bring suit in case the court should levy an assessment, and that the order of itself did not amount to a call, from which prescription would begin to run. *Glenn v. Macon*, (1887) 32 Fed. Rep. 7.

¹ *Vanderwerken v. Glenn*, (1888) 85 Va. 9.

² *Glenn v. Williams*, 60 Md. 95.

³ *Glenn v. Semple*, 80 Ala. 159; S. C. 60 Am. Rep. 92.

CHAPTER XXVII.

PAYMENT OF SUBSCRIPTIONS.

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| <p>§ 555. Introductory.</p> <p>556. What paper may be taken in payment.</p> <p>557. Payment in property or services.</p> <p>558. What kind of property may be accepted.</p> <p>559. Overvaluation.</p> | <p>§ 560. Presumption of fraud from gross overvaluation.</p> <p>561. Payment of less than par.</p> <p>562. Acceptance of less than par, constructive fraud.</p> <p>563. Statutory and constitutional provisions construed.</p> <p>564. The same subject continued.</p> |
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§ 555. Introductory.—The taking of stock creates a contract to pay for it in the mode prescribed by the charter, and a stipulation to that effect is not necessary.¹ As was said in an early New York case, whatever may be the form or language of a subscription to the stock of an incorporated company, any person who in any manner becomes a subscriber for, or engages to take any portion of the stock of such company, thereby assumes to pay according to the conditions of the charter.² Accordingly in subscribing for stock in a railroad company, the charter of which creates and defines the terms of the contract between the company and the stockholder, it is only necessary that the writing should indicate the intention to become a stockholder, and the number of shares that are taken by the subscriber.³ And as the capital stock or shares of the corporation constitute a trust fund for the benefit of the general creditors of the corporation, the

¹ *Fry v. Lexington &c. R. Co.*, Palmer, 34 Me. 364; *Waukon &c. R. Co. v. Dwyer*, 49 Iowa, 121; *Danbury &c. R. Co. v. Wilson*, 22 Conn. 435; *Hawley v. Upton*, (1880) 102 U. S. 314; *Rensselaer &c. R. Co. v. Barton*, (1857) 16 N. Y. 457; *Lake Ontario &c. R. Co. v. Mason*, (1857) 16 N. Y. 451.

² *Rensselaer &c. Co. v. Barton*, (1857) 16 N. Y. 460.

³ *Fry v. Lexington &c. R. Co.*, (1859) 2 Metc. (Ky.) 314.

subscriptions to this can only be fulfilled by a *bona fide* payment, in conformity with the contract.¹ It is also held for the same reason that the officers of the corporation can not impair the trust by accepting simulated or fictitious payment of subscriptions.²

§ 556. What paper may be taken in payment.—A corporation may give credit for its stock as well as for other property sold by it, and it has the same right to enforce the contract against the subscriber.³ Thus, stock may be issued for promissory notes where the charter clearly contemplates giving credit to subscribers.⁴ So also a note given by a subscriber to the capital stock of a bank, in payment of a first assessment, the certificate for the stock being issued thereupon, is not void under the section of a State constitution providing that “no corporation shall issue stock except for money paid;” nor is

¹ *Sawyer v. Hoag*, 17 Wall. 610.

² *Coffin v. Ransdell*, (1887) 110 Ind. 417. *Acc. Rider v. Morrison*, (1882) 54 Md. 429.

³ *Mitchell v. Beckman*, (1883) 64 Cal. 117.

⁴ *Ogdensburg &c. R. Co. v. Wooley*, 3 Abb. Dec. (N. Y. App.) 398; *Magee v. Badger*, (1859) 30 Barb. 246; *Goodrich v. Reynolds*, 31 Ill. 490; *Hardy v. Merriweather*, 14 Ind. 203; *Vermont Central R. Co. v. Clays*, 21 Vt. 30. In Wisconsin, stock may be issued for a note secured by real estate, where no provision as to the payment for stock is made. *Clark v. Farrington*, (1860) 11 Wis. 306; *Blunt v. Walker*, (1860) 11 Wis. 334; s. c. 78 Am. Dec. 709; *Cornell v. Hichins*, 11 Wis. 353; *Andrews v. Hart*, 17 Wis. 297; *Lyon v. Ewings*, 17 Wis. 61; *Western Bank v. Tallman*, 17 Wis. 530. In an Illinois case, the plaintiff alleged that, before the organization of the corporation, it was agreed between him and the individual members thereof that the subscriptions to the capital stock should be paid, not in

money, but out of the profits of the business. A by-law provided that the subscribers should be charged with their stock liability, and credited with the dividends, until the liability should be extinguished.

This was afterwards repealed, with the plaintiff's assent, and a resolution adopted that each subscriber give his note, payable on demand, for the amount of his subscription and interest, and pledge his right to stock as collateral, and the plaintiff withdrew his dividends as they accrued. It was, therefore, considered that, even if such an agreement were valid and proved, it was abrogated, and the note remained valid. *McDowell v. Chicago Steel Works*, (1883) 124 Ill. 491. But in some States it is held that stock is not to be issued for promissory notes, but that the subscriber will be credited with the amount actually collected thereon. *Moses v. Ocoee Bank*, 1 Lea, 398. So in New York, it can not be issued for the subscriber's own note, 1 N. Y. Rev. Stat. ch. 18, tit. 4, § 2.

it void under an act requiring corporations to publish semi-annual statements of their paid-up capital, and that nothing should be counted as capital except money; nor is it void under the penal provision that any director of a corporation, voting to receive a note in payment of an assessment on a stock subscription, should be guilty of a misdemeanor.¹ Again, stock may be issued for bond and mortgage.² A subscription by a municipal corporation to the capital stock of a railway company may be paid in bonds of the municipality.³ It is further held that the statutory requirement that subscriptions to capital stock shall be paid in cash is met by a payment by a certified check on a national bank, wherein the drawee has funds sufficient to meet it.⁴ But the subscription is void if the corporation has contracted to allow the subscriber an indefinite time in which to pay.⁵ Municipal bonds issued in aid of railways can not be made to run for a longer period than that prescribed by the enabling act.⁶ And by an indorsement they may be made to become due and payable upon default in payment of interest.⁷ In the absence of express authority to make

¹ *Pacific Trust Co. v. Dorsey*, (1887) 72 Cal. 55, construing Cal. Const. art. xii, § 11; Cal. Laws of 1875-76, p. 729; Cal. Pen. Code, § 560.

² *Valk v. Crandall*, 1 Sandf. Ch. (N. Y.) 179; *Leavitt v. Pell*, 27 Barb. 322.

³ *Meyer v. City of Muscatine*, 1 Wall. 384, 392; *Town of Montclair v. Ramsdell*, 107 U. S. 147; *Town of Concord v. Portsmouth Savings Bank*, 92 U. S. 625; *Commonwealth v. Pittsburgh*, 41 Pa. St. 270; *Curtis County v. Butler*, 24 How. 435; *Evansville &c. R. Co. v. City of Evansville*, 15 Ind. 395. *Contra*, *Starin v. Town of Genoa*, 23 N. Y. 439. But it is not with the railway company to elect to take bonds and to bring proceedings to compel their issue; its only claim is for money. *Chicago &c. R. Co. v. St. Anne*, 101 Ill. 151; *Wood's Ry. Law*, § 128.

⁴ *In re Staten Island Rapid Transit*

R. Co., 37 Hun, 422. *Cf.* *Thorp v. Woodhull*, (1844) 1 Sandf. Ch. 411, holding that an issue of stock upon a subscription paid by check taken in payment as equivalent to specie can not be objected to by the subscriber making such payment.

⁵ *Van Allen v. Illinois &c. R. Co.*, 7 Bosw. 515.

⁶ *Cairo &c. R. Co. v. Sparta*, 17 Ill. 106; *People v. Harp*, 67 Ill. 62. *Cf.* *Wheatland v. Taylor*, 29 Hun, 70. In *Norton v. Town of Dyersburg*, 127 U. S. 160, a general act authorized municipal corporations to issue railroad-aid bonds running six years, and a special act authorized the issue by a town of such bonds running four years, are not to be construed together to authorize the town to make its bonds payable in ten years. *Cf.* *Wheatland v. Taylor*, 29 Hun, 70.

⁷ *Griffin v. City Bank*, 53 Ga. 534.

municipal bonds payable elsewhere, they are to be made payable at the municipal treasury.¹ And when the place of payment is named in the bonds, neither the municipality nor the legislature can make any change therein.²

§ 557. Payment in property or services.—Subscriptions to the capital stock of a corporation need not be paid in cash. The payment, if made and received in good faith, may be either in money or in property which the corporation is authorized to purchase.³ Wherefore, it may be stated as a general rule that, in the absence of fraud, the courts will treat as a payment what the parties have agreed shall be a payment, even when the rights of creditors are involved.⁴ The earlier cases held that the contract of the subscribers could only be fulfilled by payment in money. In later cases this doctrine has been relaxed, and stock issued and paid up in work and labor or in purchase of property of a kind that the corporation is authorized to hold has been held to have been legally issued. Statutes have been passed authorizing corporations to purchase property needed for their business, and to issue stock in payment for it, or to accept such property in payment for subscriptions to capital stock. But transactions under these statutory powers have been upheld only when the contract for the rendition of services or the purchase of property, payable in stock, has been made in good faith and taken in payment at a fair valuation; and the courts have inflexibly enforced the rule that payment of stock subscriptions is good as against creditors only where payment has been made in money or in what may fairly be considered as money's worth.⁵ When, however, this has been done, the validity of the transaction is

¹Shellock v. Winetka, 68 Ill. 530. But in Calhoun County v. Galbraith, 99 U. S. 214, it was held that the act being silent as to place of payment, the county might designate the place.

²Dillingham v. Hook, 32 Kan. 185; Lowe v. Bliss, 24 Ill. 168; s. c. 76 Am. Dec. 742; Childs v. Laffin, 55 Ill. 159; Chitty on Bills, 566.

³Coffin v. Ransdell, (1887) 110 Ind. 417; Elkington's Case, L. R. 2 Ch.

App. 527; Bridger's Case, L. R. 5 Ch. App. 305; Simpson's Case, L. R. 4 Ch. App. 184; Thompson's Case, 34 L. J. Ch. 525; Fisher's Case, 53 L. T. 832; Sherrington's Case, 34 W. R. 49.

⁴Brant v. Ehlen, (1882) 59 Md. 1.

⁵Weatherby v. Baker, 35 N. J. Eq. 501, and authorities there cited. Acc. Libby v. Tobey, (Me. 1890) 19 Atlan. Rep. 904.

not to be questioned.¹ It is not necessary for any purpose that the ceremony of paying the money by the company to the subscriber, and by him again to the company, should be gone through with.² The issue of stock for property or services is discretionary, however, on the part of the corporation, and that discretion can not be questioned by other subscribers who are not injured.³ Nor, indeed, is a disposition of corporate stock upon any terms, agreed to by all the members, to be questioned save by creditors of the company. Thus where unissued stock of a corporation which had no creditors was, by agreement of all the stockholders, paid for with corporate funds, and issued to one stockholder to be held in trust for all, it was held that the issue was valid, and that the directors had no authority afterwards to direct the stock to be sold.⁴

¹ *Frenkel v. Hudson*, (1886) 82 Ala. 158; *Sanger v. Upton*, (1875) 91 U. S. 56, 60; *Brant v. Ehlen*, (1882) 59 Md. 1; *Searight v. Payne*, 6 Lea, 283; *Burkeshaw v. Nichols*, L. R. 3 App. Cas. 1004, 1012; *Foreman v. Bigelow*, 4 Cliff. 508, 544; *Coffin v. Ransdell*, (1887) 110 Ind. 417; *Chouteau v. Dean*, 7 Mo. App. 210. *Contra*, *Neuse River &c. Co. v. Commissioners*, 7 Jones' L. 275. *Cf.* *Henry v. Vermillion &c. R. Co.*, 17 Ohio, 187. By 30 & 31 Vict. ch. 131, § 25, stock is deemed to be payable in money, unless a contract that it be otherwise payable shall be duly made in writing and filed with the registrar of joint-stock companies at or before the issue of the shares. But even though there has been no registration of the contract as required by this statute, yet if the payment has been actually made in property or services rendered, or upon accounts stated and settled, where there has been no fraud, the parties will be bound. *Jones' Case*, L. R. 6 Ch. App. 48; *Shroeder's Case*, L. R. 11 Eq. Cas. 131; *Foreman v. Bigelow*, (1878) 4 Cliff. 508; *Phelan v. Haz-*

ard, 5 Dill. 45; *Pell's Case*, L. R. 5 Ch. 11; *Spayo's Case*, L. R. 8 Ch. 407, 413; *Drummond's Case*, L. R. 4 Ch. 772; *Maynard's Case*, L. R. 9 Ch. 355; *Ferras' Case*, L. R. 18 Eq. 670; *Nichol's Case*, L. R. 7 Ch. 533; s. c. on appeal to the House of Lords, 26 W. R. 819; *Ex parte Clarke*, L. R. 7 Eq. 550. But if the accounts be not thus liquidated, and there is only an agreement that the property be taken in payment for the stock, a settlement in cash will be necessary upon a winding-up. *Crickmer's Case*, L. R. 10 Ch. App. 614; *Fotheringill's Case*, L. R. 8 Ch. App. 270; *Dent's Case*, L. R. 15 Eq. Cas. 407; *Rowland's Case*, 42 L. T. N. S. 785.

² *Beach v. Smith*, (1864) 30 N. Y. 116; *Black River &c. R. Co. v. Clarke*, 25 N. Y. 208; N. Y. Laws of 1850, ch. 140, § 2.

³ *Boston &c. R. Co. v. Wellington*, (1873) 113 Mass. 79; *Stoddard v. Shetucket &c. Co.*, (1868) 34 Conn. 542; *Vermont Central R. Co. v. Claves*, (1848) 21 Vt. 30.

⁴ *Jones v. Morrison*, (1883) 81 Minn. 140.

§ 558. **What kind of property may be accepted.**—After a company is organized it often happens that new subscriptions can be obtained only on new and peculiar terms, as, for example, that the subscriber be permitted to pay in labor or materials. And since the company frequently could not otherwise fulfil the object of its creation,¹ it is held that it may accept in payment of its shares any property of a kind which it is authorized to purchase, or which is necessary for the purposes of its legitimate business.² Thus stock may be issued for labor, construction work, materials and land; provided always that these transactions are entered into and carried out in good faith.³ Stock may be issued by a railway company for cross-ties to be used in the construction of its road.⁴ And subscriptions to stock of a corporation, organized to carry on an iron-furnace, may be paid in coal lands and in iron lands.⁵ It may issue stock in lieu of damages which it is liable to pay,⁶ and in satisfaction of its debts.⁷ And where certain shares of stock in a corporation organized to construct a bridge over a river were issued to the proprietor of a newspaper published in the city where the bridge was to be built, the consideration therefor being the publication of articles and communications in his journal favoring the enterprise and pointing out its value to the community and its standing as an investment, this was held a good consideration.⁸

§ 559. **Overvaluation.**—Where a corporation agrees to issue shares of its stock in payment for services rendered to it,

¹ *Philadelphia &c. R. Co. v. Hickman*, (1887) 28 Pa. St. 318; *Erie &c. Co. v. Brown*, 20 Pa. St. 156.

² *Coffin v. Ransdell*, (1887) 110 Ind. 417; *Liebke v. Knapp*, (1883) 79 Mo. 22; *Kehlor v. Landemann*, 11 Mo. App. 550; *Carr v. Le Fevre*, 27 Pa. St. 413; *Brant v. Ehlen*, (1882) 59 Md. 1; *American Silk Works v. Solomon*, 4 Hun, 135; *Bedford County v. Nashville &c. R. Co.*, 14 Lea, 525; *Philadelphia &c. R. Co. v. Hickman*, (1857) 28 Pa. St. 318; *Clark v. Farrington*, 11 Wis. 306.

³ *Branch v. Jessup*, 106 U. S. 468.

⁴ *Ohio &c. R. Co. v. Cramer*, 23 Ind. 490.

⁵ *Searight v. Payne*, 6 Lea, 233.

⁶ *Philadelphia &c. R. Co. v. Hickman*, (1857) 28 Pa. St. 318.

⁷ *Carr v. Le Fevre*, 27 Pa. St. 413; *Reed v. Hayt*, 51 N. Y. Super. Ct. Rep. 121; *Appleyard's Case*, 49 L. J. Ch. 290.

⁸ *Liebke v. Knapp*, (1883) 97 Mo. 22, where it was said that payment of a stock subscription may be made in whatever represents to the corporation a fair, just, lawful and needed equivalent for the money subscribed.

the fact that the result shows that the price agreed to be paid is extravagant does not of itself furnish a ground to release the corporation from its contract, particularly where no claim is made that the contract is prejudicial to creditors.¹ Unless the agreement is rescinded or impeached for fraud, the courts, as between the parties, will treat that as a payment which they have agreed should be a payment.² Accordingly an action at law can not be maintained by the receiver of a corporation to collect, as unpaid subscriptions, the difference between what is claimed to be the actual value of property given by certain subscribers and received by the corporation in payment of their subscriptions, and the amount of the subscriptions, where there was no fraud, and the property, although overvalued, was such as the corporation required for the purposes of its legitimate business.³ For there must be actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account.⁴ And where a corporation which is authorized by its charter to buy land and pay for it in full-paid stock, issues stock to an amount greatly in excess of the value of the land, and the shares are sold to a purchaser for value, he is not liable to the creditors of the corporation on the ground that his stock is not fully paid for, where there was no fraud in the original transaction and the corporation has taken no steps to rescind it.⁵ For even if a purchaser of stock were bound to inquire whether the stock had been fully paid for or not, a proposition not supported by authority, such inquiry at most would, if made, only have disclosed the fact that the stock had been paid for in lands, and that perhaps some persons did not consider them worth as much as the stock at par, but that would not prove that the company had not accepted them in full payment, as the resolution of the stockholders' meeting shows it did, nor that the stock so issued was not full paid. Nor would such facts have suggested that if he purchased the stock he would become

¹ *Arapahoe &c. Co. v. Stevens*, (Colo. 1890) 22 Pacif. Rep. 823.

² *Phelan v. Hazard*, (1878) 5 Dill. 45; *Coffin v. Ransdell*, (1887) 110 Ind. 417.

³ *Coffin v. Ransdell*, 110 Ind. 417.

⁴ *Field, J., in Coit v. North Carolina &c. Co.*, (1887) 119 U. S. 343.

⁵ *Du Pont v. Tilden*, (1890) 42 Fed. Rep. 87; s. c. 8 Ry. & Corp. L. J. 28.

liable to contribute to the difference between the value of the land and the par value of the stock. The stock having already been paid for once, that payment was sufficient to protect a purchaser for value against the company or its creditors.¹ And a creditor of the corporation can not maintain a bill to compel the shareholders to pay the amount of their subscription, if it appears that the stock has been fully paid up in property, at an honest and fair valuation, though by reason of subsequent events the property has depreciated, and no longer represents the face value of the stock.²

§ 560. Presumption of fraud from gross overvaluation.—

If the property received is grossly unequal in value to the par value of the shares, the shareholder who received the shares originally, or his subsequent transferee with notice of the circumstances, may be compelled to make up the difference in value in a suit brought by or on behalf of the persons injured

¹ *Du Pont v. Tilden*, (1890) 42 Fed. Rep. 87; s. c. 8 Ry. & Corp. L. J. 28. "But on the ground of gross overvaluation alone, the company might, if it had acted in apt time, have had this transaction set aside, and the stock surrendered and cancelled on a reconveyance of the land for the stock while it still remained in the hands of the original holder, but not when it is impossible to restore the parties to their original condition, as after the stock, at least a part of it, has gone into the hands of *bona fide* purchasers for value, and coal has been largely mined out of the land. The cases of *Bridge Co. v. McCluney*, 8 Mo. App. 500, and *Brant v. Ehlen*, 59 Md. 1, seem to me to be instructive upon the points raised, and conclusive against complainants' right to recover." *Du Pont v. Tilden*, (1890) 42 Fed. Rep. 87; s. c. 8 Ry. & Corp. L. J. 28.

² *Coit v. North Carolina & Co.*, (1887) 119 U. S. 393. *Acc. Schenck v. Andrews*, (1874) 57 N. Y. 133,

where it is held that the directors are the judges of the value of the property, and subsequent depreciation in prices should not be used to impeach the good faith of the parties. *Carr v. Le Fevre*, (1856) 27 Pa. St. 413, where it was said that taking property at a prospective value never realized, is an error of judgment merely, and, in the absence of fraud, it forms no ground for rescinding the contract. *Schroder's Case*, L. R. 11 Eq. 131. *Acc. Osgood v. King*, 42 Iowa, 478, where the property was worth twenty-seven thousand dollars and stock was issued to the amount of one hundred and ninety thousand. And see *Bolz v. Ridder*, 19 Weekly Dig. 463, where a patent right valued at one time at one thousand dollars, being afterwards sold for shares to the amount of a hundred thousand, was held only presumptively fraudulent, and sufficiently capable of explanation to be submitted to the jury.

thereby.¹ But where the trustees of a corporation were authorized to issue stock and to exchange it for property, the statute declaring that when exchanged, it should be taken to be full paid stock and not liable to further calls, the trustees, who were the only members of the corporation, exchanged the whole capital stock for their own property, then distributed the stock among themselves, and sold it to innocent purchasers as fully paid, and it was held that the purchasers could not maintain a suit to compel the trustees to account to the corporation for a fraudulent disposition of its capital stock, notwithstanding the fraudulent character of the transaction.² The fact that the property accepted in payment of stock was not at the date of incorporation worth more than one-fifth of the valuation set upon it, although presumptive evidence of fraud, does not charge the incorporators with legal fraud where they are shown to have made their valuation honestly.³ While it is generally the province of the jury to determine whether property has been accepted for the issue of shares at an overvaluation and whether there was a fraudulent intent in so doing,⁴ yet it is not necessary in the action by the creditor to allege fraud in the petition in order to render competent evidence of fraud in the organization of the corporation and the issuance of the stock.⁵ For if the evidence shows the

¹ Taylor on Corporation, § 545, citing *Bailey v. Coal Co.*, 69 Pa. St. 334, and *Boynton v. Hatch*, 47 N. Y. 225. Under the rule of these cases, if the defendant's claim be true, that he took his shares of stock from the vendor as full-paid shares, his liability would be the same as that of the vendor because he knew the circumstances under which it was issued. *Boulton & Co. v. Mills*, (1889) 78 Iowa, 460; s. c. 6 Ry. & Corp. L. J. 417, where it was held to be immaterial that all the stock was at first issued to three of the incorporators, and was afterwards re-issued to the defendant and others, it being shown that he was an original subscriber for stock, which he only partly paid for, and that the

organization of the corporation, the percentage to be paid for the stock, and the issuance and acceptance thereof, were parts of a single transaction. Iowa Code, § 1082; *Osgood v. King*, 42 Iowa, 478; *Jackson v. Træer*, 64 Iowa, 469; *Sawyer v. Hoag*, 17 Wall. 610.

² *Foster v. Seymour*, 23 Fed. Rep. 65.

³ *Young v. Erie Iron Co.*, (1887) 65 Mich. 111.

⁴ *Lake Superior Iron Co. v. Drexel*, 90 N. Y. 87; *Boynton v. Hatch*, 47 N. Y. 225; *Draper v. Beadle*, 16 Week. Dig. 475; *Bolz v. Ridder*, 19 Week. Dig. 463.

⁵ *Boulton & Co. v. Mills*, (1889) 78 Iowa, 460; s. c. 6 Ry. & Corp. L. J. 417.

overvaluation to have been so excessive that it must have been intentional the court will itself, as a presumption of law, pronounce the transaction fraudulent, unless it be reasonably explained.¹ Yet in order for the court to find a fraud in law, there must be shown, either an intentional fraud in fact, or such reckless conduct in the valuation without regard to the real value of the property as would indicate, without explanation, an intent to defraud.² In England, when no creditors' rights are involved and all the shareholders of the corporation have acquiesced, the directors will not be liable to the company with respect to profits accruing to them from an issue of shares for property grossly overvalued.³

§ 561. Payment of less than par.—A corporation may dispose of its stock for less than its face value, and the transaction, as between the corporation and the purchaser, will be valid, unless prohibited by statute.⁴ And no suit can be main-

¹ *Douglass v. Ireland*, 73 N. Y. 100, where property worth \$64,000 was valued at \$300,000; *Boynton v. Andrews*, 63 N. Y. 93, where property worth \$50,000 was taken at \$100,000; *Coit v. North Carolina &c. Co.*, (1887) 119 U. S. 343; *Van Cott v. Van Brunt*, 82 N. Y. 535; *Boynton v. Hatch*, 47 N. Y. 225; *Carr v. Le Fevre*, 27 Pa. St. 413. Defendant having conceded that he paid but five hundred dollars for twenty-five hundred dollars in stock can not introduce evidence that the property was believed to be worth three times the par value of the stock, one-half of which was issued for it. *Boulton &c. Co. v. Mills*, (1889) 78 Iowa, 460; *S. C. 6 Ry. & Corp. L. J.* 417.

² *Young v. Erie Iron Co.*, (1887) 65 Mich. 111; *Lake Superior Iron Co. v. Drexel*, 90 N. Y. 87; *Douglass v. Ireland*, 73 N. Y. 100; *Boynton v. Andrews*, 63 N. Y. 93; *Schenck v. Andrews*, 57 N. Y. 134. In *Boynton v. Hatch*, 47 N. Y. 225, the Court of Appeals of New York was evenly divided upon the question, whether,

after having shown that the property given in payment of shares was taken at an overvaluation, it was necessary for the plaintiff to further prove that it was done knowingly and with fraudulent intent. Where property is taken in payment for shares of the capital stock of a corporation, and the transaction is made matter of record, and ratified by the directors and stockholders, the shares will be treated as fully paid, as against one who became assignee of a judgment creditor of the corporation, after he had purchased the shares with full knowledge of the facts attending their issue. *Walburn v. Chenault*, (Kan. 1890) 23 Pacif. Rep. 656.

³ *In re Ambrose &c. Co.*, 14 Ch. Div. 390.

⁴ *Harrison v. Arkansas Valley Ry. Co.*, (1882) 4 McCrary C. Ct. 264; *Scovill v. Thayer*, (1881) 105 U. S. 153. The court in the latter case said: "The stock held by the defendant was evidenced by certificates of full-paid shares. It is con-

tained by the company to collect the unpaid balance for any purpose of its own, the shares being issued as full-paid on a fair understanding.¹ Accordingly the stockholders of a mining corporation organized under the laws of California are not obliged to pay in the par value of their shares, and independent of an agreement to the contrary, an assessment on their stock can be enforced only by the sale of their shares.² It has been held generally in English cases that not only is the company bound, but its creditors also are bound by such a contract.³ But the American rule is that the contract, although binding on the company, is a fraud in law on its creditors, which they can set aside; and when their rights intervene and their claims are to be satisfied, the stockholders can be required to pay the subscriptions in full.⁴ This grows out of the American doctrine that the stock subscribed is a trust fund for the payment of creditors.⁵ It is so held out to the public, who have no means of knowing the private contracts made between the corporation and its stockholders. The creditor has, therefore, the right to presume that the stock subscribed has been or will be paid up.⁶ The company can not compel specific performance of a contract to take shares below par, for to carry out its own part of such an agreement would be an *ultra vires* act.⁷

ceded to have been the contract between him and the company that he should never be called upon to pay any further assessments upon it. The same contract was made with all the other shareholders, and the fact was known to all as between them and the company. This was a perfectly valid agreement. It was not forbidden by the charter or by any law or public policy, and as between the company and the stockholders was just as binding as if it had been expressly authorized by the charter."

¹ *Scovill v. Thayer*, (1881) 105 U. S. 154.

² *In re South Mountain Consolidated Mining Co.*, (1881) 7 Sawyer Ct. Ct. 30.

³ *Waterhouse v. Jamieson*, L. R. 2 H. L. (Sc.) 29; *Currie's Case*, 3 De G. J. & S. 367; *Carling's Case*, 1 Ch. Div. 115.

⁴ *Scovill v. Thayer*, (1881) 105 U. S. 154; *Sawyer v. Hoag*, 17 Wall. 610; *New Albany v. Burke*, 11 Wall. 96; *Burke v. Smith*, 16 Wall. 390.

⁵ *Scovill v. Thayer*, (1881) 105 U. S. 154; *Wood v. Dummer*, 3 Mason, 308; *Mumma v. Potomac Co.*, 8 Pet. 281; *Ogilvie v. Knox Ins. Co.*, 22 How. 387; *Sawyer v. Hoag*, 17 Wall. 610.

⁶ *Scovill v. Thayer*, (1881) 105 U. S. 154; *Shickle v. Watts*, (1888) 94 Mo. 410.

⁷ *Western Ry. Co. v. Mowatt*, 12 Jur. pt. I. 407.

§ 562. Acceptance of less than par, constructive fraud.

While a presumption of fraud arises in the case of an issue of shares for property or services, only when gross overvaluation is shown; in the case of an issue for money, the acceptance of any amount less than par as payment in full is sufficient, without proof of actual fraudulent intent, to constitute constructive fraud, for in the latter case there is no room for mistaken judgment.¹ Accordingly, *mandamus* will not lie at the suit of a subscriber to compel the issue of shares at less than par in pursuance of a resolution of the stockholders that it be so issued.² And cancellation of an issue of stock below par may be decreed, at the instance of any shareholder not estopped by his conduct or acquiescence from objecting thereto.³ Furthermore, it seems that when the issue would amount to a fraud upon the public, the attorney-general of the State may prevent it by injunction.⁴ Unless the issue were absolutely void by statute,⁵ stockholders who are parties to the transaction by which stock has been issued to them for less than par, or who have knowingly acquiesced in an issue for less than the face value of the stock, are estopped from questioning its legality.⁶ Nor can their transferees bring suit in behalf of the corporation and other stockholders against the parties participating in the issue.⁷ Accordingly, a participating subscriber can not withdraw and recover back the money already paid; for he is *in pari delicto* with the corporation.⁸ And if shareholders participate in an issue of stock for no consideration whatever, their contracts among themselves in regard to it will not be enforced by the courts.⁹ If the directors have par-

¹ Flinn v. Bagley, 7 Fed. Rep. 785.

⁶ Scovill v. Thayer, (1881) 105 U. S.

² State v. Timken, (1886) 48 N. J. L. 87.

143; *In re* Gold Co., 2 Ch. Div. 701, 712.

³ Fisk v. Chicago &c. R. Co., 53 Barb. 513; Gilman &c. R. Co. v. Kelly, (1875) 77 Ill. 426; Campbell v. Morgan, 4 Bradw. 100.

⁷ Nott v. Clews, 14 Abb. N. C. 437; Parsons v. Hays, 14 Abb. N. C. 419; Flagler Co. v. Flagler, (1883) 19 Fed. Rep. 468; s. c. 14 Abb. N. C. 435;

⁴ Green's Brice's *Ultra Vires*, 3d ed. 708, 709. Cf. Holman v. State, (1886) 105 Ind. 569; Jersey City &c. Co. v. Dwight, 29 N. J. 242; Erie Ry. Co. v. Casey, 26 Pa. St. 287, 318.

Langdon v. Fogg, (1883) 18 Fed. Rep. 5.

⁸ Clarke v. Lincoln Lumber Co., (1884) 59 Wis. 655; Goff v. Hawkeye &c. Co., 62 Iowa, 691.

⁵ Knowlton v. Congress &c. Co., 14 Blatchf. 364, 368; s. c. 103 U. S. 49, reversing s. c. 57 N. Y. 518.

⁹ Tobey v. Robinson, (1881) 99 Ill.

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ticipated in the profits of the issue, the company has recourse against them for the damages it has sustained.¹

§ 563. Statutory and constitutional provisions construed.

There are many statutory and constitutional provisions prohibiting the issue of stock except for money, property or labor actually received.² Under these constitutional provisions an issue to an unreasonable amount beyond the value of property actually received can not be authorized by statute.³ But the prohibition of the Illinois constitution against the issue, by railway corporations, of "stock or bonds, except for money, labor, or property actually received and applied to the purposes for which such corporation was created," is not intended to interfere with the usual methods of raising money for legitimate purposes, as for construction of the road by the issue and sale of stock and bonds before the work to be paid for has been actually done.⁴ For the latter part of the clause of the constitution in question, which declares that all stocks, dividends, and other fictitious increase of the capital stock or indebtedness shall be void, clearly points out the chief object which the constitutional convention sought to accomplish in adopting it; and to this we must look in a large degree for a

¹ *Flagler &c. Co. v. Flagler*, (1883) 19 Fed. Rep. 468; *Continental Telegraph Co. v. Nelson*, 49 N. Y. Supr. Ct. Rep. 197; *Nott v. Clews*, 14 Abb. N. C. 487; *Osgood v. King*, 42 Iowa, 478. *Cf.* *Langdon v. Fogg*, 18 Fed. Rep. 5; s. c. 14 Abb. N. C. 435; *Douglass v. Ireland*, 73 N. Y. 100; *De Ruvigne's Case*, 5 Ch. Div. 316; *Carling's Case*, 1 Ch. Div. 115; *Currie's Case*, 3 De Gex, J. & S. 367.

² For example the New York "Stock Corporation Law of 1890," enacts that "no corporation shall issue either stock or bonds except for money, labor done, or property actually received for the use and lawful purposes of such corporation, at its fair value, and all stock issued in violation of the provisions of this section shall be void." N. Y. Laws of 1890, ch. 664, § 42. Substantially

similar prohibitions are made by Wis. Rev. Stat. (1878) § 1753, as amended by Laws of 1881, ch. 93; Mass. Pub. Stat. ch. 112, § 61; Mo. Rev. Stat. § 927; N. H. Gen. Stat. ch. 134, § 8; Ark. Const. (1874) art. xii; Pa. Const. art. xvi, § 7; Ala. Const. art. xiii, § 6; Cal. Const. art. xii, § 11. See also the constitutions of Colorado, Louisiana and Texas, as to corporations in general, and of Illinois and Nebraska, as to railway companies, cited by Stimpson's Am. Stat. Law, (1886) § 452. *Cf.* constitutions and statutes cited in § 479, *supra*.

³ *Ewing v. Oroville Min. Co.*, (1880) 56 Cal. 647; Cal. Const. art. xii, § 11. Cal. Code, § 559, is therefore unconstitutional.

⁴ *Peoria & Springfield R. Co. v. Thompson*, 103 Ill. 187.

solution of the language which precedes it. The object was, doubtless, to prevent reckless and unscrupulous speculators, under the guise or pretense of building a railroad, or of accomplishing some other legitimate corporate purpose, from fraudulently issuing and putting upon the market bonds or stocks that do not and are not intended to represent money or property of any kind, either in possession or expectancy. Under this provision of the constitution, railroad companies have no right to lend, give away, or sell on credit, their bonds or stock, nor have they any right to dispose of either except for a present consideration, and for a corporate purpose.¹ And therefore under a similar constitutional provision that "no private corporation shall issue stock or bonds except for money or property actually received, and all fictitious increase of stock or indebtedness shall be void," mortgage bondholders, who buy in the property and franchise of a corporation upon foreclosure sale under their mortgage, are not prohibited from fixing the terms upon which they will surrender those interests, and they may reorganize upon substantially the same basis, as to capital stock and bonded indebtedness, as that of the old corporation and its predecessor previous to the adoption of the constitution, although under that arrangement they receive both stock and bonds in a large amount, of which the amount of the stock alone is sufficient to cover the full value of the property, rights, and privileges of the reorganized company.² For this provision does not necessarily indicate a purpose to make the validity of every issue of stock or bonds by a private corporation depend upon the inquiry whether the money, property, or labor actually received therefor was of equal value in the market with the stock or bonds so issued. It is not clear, from the words used, that the framers of that instrument intended to restrict private corporations, at least when acting with the approval of their stockholders, in the exchange of their stock or bonds for money, property or labor, upon such terms as they deem proper, provided always, the transaction is a real one, based upon a present consideration,

¹ Harlan, J., in *Memphis &c. R. Co. v. Dow*, (1887) 120 U. S. 298. ² *Memphis &c. R. Co. v. Dow*, (1887) 120 U. S. 287. Cf. *Stein v. Howard*, quoting from *Peoria &c. R. Co. v. Thompson*, 103 Ill. 187, 201. (1884) 65 Cal. 616.

and having reference to legitimate corporate purposes, and is not a mere device to evade the law and accomplish that which is forbidden.¹ But a contract to furnish the labor and materials for construction of a railroad at an expenditure not to exceed a certain sum, the corporation, in consideration thereof, to issue to the contractor an amount of its capital stock fifty per centum greater as fully paid up and an equal amount of its first mortgage bonds, was held to contravene a constitutional provision prohibiting issuance of stocks or bonds except for money, labor done, or property actually received; it appearing that the materials could be furnished and the road built for less than the first sum in cash.²

§ 564. The same subject continued.—Under a constitutional provision, that no corporation shall issue stock or bonds except for money, labor done, or money or property actually received, an increase in the value of the property in which the original stock is invested will not justify an issue of additional capital stock to the stockholders as a stock dividend.³ So also under a statute providing that a corporation shall not lend money to its stockholders; and prohibiting a corporation from issuing stock or bonds except “for money paid, labor done, or money or property actually received,” and making all fictitious issues of stock or bonds void, it is held that a corporation whose plant is not susceptible of division, or prudently convertible into cash, and which has no ready money, can not adopt a resolution reducing its capital stock one-half, on the ground of its being necessary and the remaining capital being all-sufficient for the purposes of the corporation; and then on the same day of the reduction, adopt further resolutions requiring the directors to pay to the stockholders *pro rata* the amount of the surplus thus created; call in and cancel the existing certificates of stock; issue new ones in their stead; authorize the directors to purchase from the stockholders the surplus for the use of the corporation; for the

¹ Harlan, J., in *Memphis &c. R. Co. v. Dow*, (1887) 120 U. S. 299.

³ *Fitzpatrick v. Dispatch &c. Co.*, (1887) 83 Ala. 604, construing Ala.

² *New Castle &c. Ry. Co. v. Simpson*, 21 Fed. Rep. 533, construing Pa. Const. art. xvi, § 7.

Const. art. xiii, § 6. *Vide supra*, § 479.

payment of the amount of such surplus issue bonds; secure them by deed of trust on all the property of the company, and create a sinking fund out of the earnings of the company to pay off the principal and interest on the bonds.¹ And, if there be no fraud, even the creditors of the corporation have no recourse against the purchasers or holders of shares originally issued below par for the difference between the par value and the price at which they were sold.² Under a constitutional prohibition of the issue of stock "except for money actually received," it is held that a contract transferring shares issued at less than par, is void, as in violation of public policy.³ So also a statute prohibiting a corporation from disposing of its capital stock at less than par, except at auction, for non-payment of assessments, does not apply to a holder of stock which the corporation has pledged or mortgaged.⁴

¹Coquard v. St. Louis &c. Co., (Mo. 1888) 7 S. W. Rep. 176, decided under Mo. Rev. Stat. §§ 933, 937.

²Ross v. Silver & Copper Island Min. Co., (Minn. 1887) 31 N. W. Rep. 219.

³Williams v. Evans, (1889) 87 Ala. 725, construing Ala. Const. of 1875, art. xiv, § 6.

⁴Peterborough R. Co. v. Nashua & Lowell R. Co., 59 N. H. 385, construing N. H. Gen. Stat. ch. 134, § 8.

CHAPTER XXVIII.

CALLS.

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| <p>§ 565. Payment by instalments — Calls.</p> <p>566. Calls continued.</p> <p>567. Delegation of authority.</p> <p>568. Calls by the court.</p> <p>569. The same subject continued. Limitation.</p> <p>570. Payment of calls after transfer.</p> <p>571. Notice of calls.</p> <p>572. Place and time of payment.</p> <p>573. Irregularities in calls — Acquiescence — Estoppel.</p> <p>574. Tender of certificates.</p> <p>575. Evidence.</p> <p>576. Defenses to actions upon calls.</p> <p style="padding-left: 2em;">(a) In general.</p> <p>577. (b) Infancy.</p> | <p>§ 578. (c) Accommodation subscription.</p> <p>579. (d) Bankruptcy of stockholder.</p> <p>580. (e) Set-off.</p> <p>581. (f) The Statute of Limitations.</p> <p>582. Calls after consolidation.</p> <p>583. Pleading and practice.</p> <p>584. The company's remedy upon unpaid calls.</p> <p>585. Forfeiture of shares for non-payment.</p> <p>586. Notice of forfeiture.</p> <p>587. Method of forfeiture.</p> <p>588. The company's claim for deficiency.</p> <p>589. The shareholders' remedies.</p> |
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§ 565. **Payment by instalments — Calls.**— The whole amount of a subscription is seldom required to be paid at one time, but is usually to be paid in instalments as the affairs of the corporation require. This is implied by the language of statutes conferring upon directors the power to require subscriptions to be paid in such instalments as they deem proper.¹ And in the contract itself, there is usually some phrase, such as, “when the directors shall require,” or “when called,” indicating that the balance is to be paid in instalments.² So that, as a general rule, the amount not paid at the time of taking the shares is not due and payable until regularly called for by the board of directors;³ and an action to enforce pay-

¹ *E. g.* Revision of N. J., p. 926, § 7; N. Y. Laws of 1875, ch. 108, § 8; N. Y. Laws of 1880, ch. 140, § 7.

² *Williams v. Taylor*, (1890) 120 N. Y. 244; *Grosse Isle Hotel Co. v. T'Anson*, (1880) 34 N. J. 442.

³ *Williams v. Taylor*, (1890) 120 N. Y. 244; *Grosse Island Hotel v. T'Anson*, (1880) 42 N. J. 10; s. c. 43 N. J. 442; *Braddock v. Philadelphia &c. R. Co.*, (1888) 45 N. J. 363; *Williams v. Taylor*, (1890) 120 N. Y. 244.

ment does not he until they have done so.¹ But notwithstanding such provisions as those referred to above, if the corporate affairs require it, there is no rule of law rendering a call for the whole amount invalid.² Even an express statutory provision that only a certain sum shall be called at any one time, seems not to render a resolution of the directors void, which, while ordering several calls for that amount, makes them payable at different times.³ But when the charter pro-

distinguishing *Lake Ontario R. Co. v. Mason*, 16 N. Y. 451; *Howland v. Edmonds*, 24 N. Y. 307, and *Tuckerman v. Brown*, 33 N. Y. 297, and reversing s. c. 41 Hun, 545; *Grissill's Case*, L. R. 1 Ch. App. 528, 535; *Bank v. Abrahams*, L. R. 6 C. P. App. 262.

¹ *Alabama &c. R. Co. v. Rowley*, 9 Fla. 508; *Grissill's Case*, L. R. 1 Ch. App. 528, 535; *Wilber v. Stockholders*, 18 Bankr. Reg. 178; *Braddock v. Philadelphia &c. R. Co.*, 45 N. J. 363; *Spangler v. Indiana &c. R. Co.*, 21 Ill. 276; *Banet v. Alton &c. R. Co.*, 13 Ill. 504; *Bank v. Abrahams*, L. R. 6 P. C. App. 262; *Granite Roofing Co. v. Michael*, 54 Md. 65, holding that a call is necessary before the subscription can be enforced even when stock has been fraudulently issued as fully paid, for property taken at an overvaluation. But when payment is to be made in land, the subscriber having failed to convey, when suit is brought for damages, it is not necessary to allege that a call has been made, an allegation of a general demand being sufficient. *Cheraw &c. R. Co. v. Garland*, (1880) 14 S. C. 63; *Ohio &c. R. Co. v. Cramer*, 23 Ind. 490. A balance due on a subscription to the capital stock of a corporation, to be paid when calls should be made therefor, is not liable to garnishment on a claim against the corporation when no call has been made. *Teague v. Le Grand*, (Ala. 1889) 5 So.

Rep. 287. But, as a matter of course, a call is unnecessary if the contract of subscription or the charter of the company fix a certain time for payment. *Phoenix Warehousing Co. v. Badger*, (1876) 67 N. Y. 294; *Goodrich v. Reynolds*, 31 Ill. 490; *Waukon &c. R. Co. v. Dwyer*, 49 Iowa, 121; *Breedlove v. Martinsville &c. R. Co.*, 12 Ind. 114; *Ross v. Lafayette &c. R. Co.*, 6 Ind. 297; *New Albany &c. R. Co. v. Pickins*, 5 Ind. 247.

² *Fox v. Allensville &c. Turnpike Co.*, (1874) 46 Ind. 31; *Haun v. Mulberry &c. Co.*, 33 Ind. 103; *Ross v. Lafayette &c. R. Co.*, 6 Ind. 297; *Spangler v. Indiana &c. R. Co.*, 21 Ill. 276; *Hays v. Pittsburgh &c. R. Co.*, (1861) 38 Pa. St. 81; *Rutland &c. R. Co. v. Thrall*, (1863) 35 Vt. 536; *London &c. Ry. Co. v. McMichael*, 4 Eng. L. & Eq. 459; s. c. 20 L. J. Ex. 227; *Birkenhead &c. Ry. Co. v. Webster*, and *Ambergate Ry. Co. v. Norcliffe*, 20 L. J. Ex. 234; s. c. CASES, 4 Eng. L. & Eq. 461; *In re Jennings*, 1 Ir. Ch. 654. But see *Stratford &c. Ry. Co. v. Stratton*, 2 Barn. & Ad. 519. Cf. *Lewis' Case*, 28 L. T. N. S. 396.

³ *Penobscot R. Co. v. Dummer*, (1855) 40 Me. 172; s. c. 63 Am. Dec. 654; *Penobscot R. Co. v. Dunn*, 39 Me. 587; *Browne & Theobald's Ry. Law*, 77, citing *Ambergate Ry. Co. v. Mitchell*, 4 Eng. L. & Eq. 461; *English Companies Clauses Act of 1845*, 8 Vic. ch. 16, § 22.

vides that calls shall be made at certain intervals, several calls made at one time are invalid.¹

§ 566. *Calls continued.*—Although calls can not be validly made for any but a legal object,² the necessity for them can not be questioned by the shareholders, as that is for the directors to determine.³ But where there is evidence of fraud or impending corporate insolvency the court will examine the matter, and if necessary set aside the call.⁴ Calls must bear equally and upon all the shares;⁵ and therefore, when made upon the towns and cities subscribing for stock, not including the stock held by private persons, they are void,⁶ and may be set aside and rectified.⁷ There is no ground upon which a call can be made when the number of shares has not been fixed by charter, or determined by the directors.⁸ Where the capital stock of a corporation is fixed at a given sum, divided into shares of a certain amount each, the capital must be fully subscribed before the subscriber can be subject to calls.⁹ Stock subscribed for after a call has been made is not subject thereto.¹⁰ The company can not legally contract to postpone indefinitely the making of calls.¹¹ Nor can directors legally postpone making a call so as to have an opportunity to escape liability by disposing of the stock held by them.¹²

¹ Stratford &c. Co. v. Stratton, 2 Barn. & Ad. 518.

² South Eastern Ry. Co. v. Hebblethwaite, 12 Ad. & E. 497.

³ Budd v. Multnomah St. Ry. Co., (1887) 15 Oregon, 413; s. c. 3 Am. St. Rep. 169; New Albany &c. R. Co. v. Fields, 10 Ind. 187; Bailey v. Birkenhead &c. Ry. Co., 12 Beav. 433, 440; Chouteau Ins. Co. v. Floyd, 74 Mo. 286, 290; Yetts v. Norfolk Ry. Co., 3 De G. & Sm. 293; Judah v. American Live Stock Assoc., 4 Ind. 333; *Ex parte* Stanley, 33 L. J. Ch. 535.

⁴ Habertson's Case, L. R. 5 Eq. Cas. 286; Sykes' Case, L. R. 13 Eq. Cas. 255.

⁵ Pike v. Bangor &c. R. Co., (1878) 68 Me. 445; Preston v. Grand &c. Dock Co., 11 Sim. 327.

⁶ Pike v. Bangor &c. R. Co., (1878) 68 Me. 445, 446.

⁷ Preston v. Grand Dock Collier Co., 11 Sim. 327, 346.

⁸ Somerset &c. R. Co. v. Cushing, (1858) 45 Me. 524; Worcester &c. R. Co. v. Hinds, 8 Cush. 110; Cabot &c. Bridge v. Chapin, 6 Cush. 50; Troy &c. R. Co. v. Newton, (1857) 8 Gray, 596.

⁹ Hale v. Sanborn, 16 Neb. 1.

¹⁰ Pike v. Bangor &c. R. Co., (1878) 68 Me. 445.

¹¹ Van Allen v. Illinois Central R. Co., 7 Bosw. 515; McComb v. Credit Mobilier Co., 13 Phila. 468.

¹² Gilbert's Case, L. R. 5 Ch. App. 559; Preston v. Grand Collier Dock Co., 11 Sim. 327.

§ 567. Delegation of authority.— A power granted to a company to raise a fund in addition to its capital stock by assessment upon the stockholders can be exercised by the stockholders only.¹ But calls for the balance due upon subscriptions to shares, are to be made by the directors in their capacity as general managers of the corporate affairs,² unless the power be expressly vested by the charter in the stockholders at large. Even when that is the case, however, they may, and frequently do, delegate their power to the directors.³ When, however, the power of making calls is vested in the directors, they can not delegate it to others, as to an executive committee of their own number,⁴ although they may commission another, for example, the president, to determine the amounts and times of payment of the installments.⁵ If the directors have illegally delegated their authority and the call has been made by another, a subsequent ratification by the directors will make it their own act and therefore valid.⁶

§ 568. Calls by the court.— When stock is subscribed, to be paid upon call of the company, and the company refuses or neglects to make the call, a court of equity may itself make the call, if the interests of the creditors require it. The court will do what it is the duty of the company to do.⁷ But under

¹ *Marlborough Manuf. Co. v. Smith*, (1818) 2 Conn. 579.

² *Budd v. Multnomah Street Ry Co.*, (1887) 15 Oregon, 413; *Ambergate Ry. Co. v. Mitchell*, 4 Eng. L. & Eq. 461; s. c. 4 Ex. Rep. 540. *Contra, Ex parte Winsor*, 3 Story, C. C. 425. *Cf. Haun v. Mulberry &c. Gravel Road Co.*, 33 Ind. 103.

³ *Rives v. Montgomery &c. Plank R. Co.*, (1857) 30 Ala. 92. But in *Ex parte Winsor*, (1844), 3 Story, C. C. 411, 425, 426, it was held that the delegation of the authority must be express, and that it would not be inferred from a by-law declaring that the directors shall take care of the interests and manage the concerns of the corporation.

⁴ *Rutland &c. R. Co. v. Thrall*, 35 Vt. 536.

⁵ *Banet v. Alton &c. R. Co.*, (1851) 13 Ill. 504. *Cf. Hays v. Pittsburg &c. R. Co.*, 38 Pa. St. 81.

⁶ *Rutland &c. R. Co. v. Thrall*, (1863) 35 Vt. 536.

⁷ *Scovill v. Thayer*, 105 U. S. 143, 155; *Hawkins v. Glenn*, (1889) 131 U. S. 319; *Glenn v. Liggett*, (1890) 135 U. S. 533; s. c. 8 Ry. & Corp. L. J. 52. The court in *Hawkins v. Glenn*, (1889) 131 U. S. 319, cited the rule laid down in *Scovill v. Thayer*, 105 U. S. 143, 155, as applying to the case, and said: "In that case it was said by Mr. Justice Woods, speaking for the court: 'There was no obligation resting on the stockholder to pay at all until some authorized demand in behalf of creditors was made for payment. The defendant owed the creditors nothing, and he

such circumstances, before there is any obligation upon the stockholder to pay without an assessment and call by the company, there must be some order of a court of competent jurisdiction, or, at the very least, some authorized demand upon him for payment.¹ Accordingly, as unpaid subscriptions constitute a fund for the payment of corporate debts, when a creditor has exhausted his legal remedies against the corporation which fails to make an assessment, he may, by bill in equity or other appropriate means, subject such subscriptions to the satisfaction of his judgment, and the stockholder can not then object that no call has been made.² For as between creditor and stockholder, it would seem to be singular if the stockholders could protect themselves from paying what they owe by setting up the default of their own agents.³ In a suit by a creditor, where the corporation and the trustees are made parties defendant, a court of equity may by its decree direct a stock assessment for the benefit of creditors which will bind stockholders who are not individually parties to the suit.⁴ Accordingly, where a corporation made

owed the company nothing save such unpaid portion of his stock as might be necessary to satisfy the claims of the creditors. Upon the bankruptcy of the company, his obligation was to pay to the assignees upon demand such an amount upon his unpaid stock as would be sufficient, with the other assets of the company, to pay its debts. He was under no obligation to pay any more, and he was under no obligation to pay anything until the amount necessary for him to pay was at least approximately ascertained. Until then his obligation to pay did not become complete."

¹ *Scovill v. Thayer*, 105 U. S. 143, 145; *Hawkins v. Glenn*, (1881) 131 U. S. 319; *Glenn v. Liggett*, (1890) 135 U. S. 533; s. c. 8 Ry. & Corp. L. J. 52.

² *Hawkins v. Glenn*, (1889) 131 U. S. 319; *Glenn v. Liggett*, (1890) 135 U. S. 533; s. c. 8 Ry. & Corp. L. J.

52, in which case the court quoting the former case said: "The condition that a call shall be made is, under such circumstances, as Mr. Justice Bradley remarks in *In re Glen Iron Works*, 20 Fed. Rep. 674, 681, 'but a spider's web, which the first breath of the law blows away.'"

³ *Hatch v. Dana*, 101 U. S. 205, 214; *Hawkins v. Glenn*, (1889) 131 U. S. 319; *Glenn v. Liggett*, (1890) 135 U. S. 533; s. c. 8 Ry. & Corp. L. J. 52.

⁴ *Hawkins v. Glenn*, (1889) 131 U. S. 319. In *Glenn v. Liggett*, (1890) 135 U. S. 533; s. c. Ry. & Corp. L. J. 52, it was said: "It was also contended in that suit by the defendant that the decree of the chancery court of the city of Richmond was void as against him, because he was not a party to the suit. On the latter point this court said: 'We understand the rule to be otherwise, and that the stockholder is bound by a

an assignment to a trustee, including therein unpaid subscriptions, and provided that future assessments should be payable directly to the trustee, and a decree to which the stockholders were not individually parties made an assessment on said stockholders, and directed the trustee to take such steps to collect the same as he might be advised, the trustee might sue therefor in his own name, the decree being valid and binding on the stockholders.¹ But a receiver having been appointed to take charge of the affairs of an insolvent insurance company upon a proceeding instituted by creditors, and the court having been petitioned to assess the stockholders upon their unpaid stock, and having assessed them and authorized the receiver to sue for the recovery of such assessment, it has been held that a stockholder was not made a party to these proceedings by the mere publication and mailing of notices of the petition for an assessment, in accordance with an order of the court to that effect, and that one who did not receive notice was not bound by the order mak-

decree of a court of equity against the corporation in enforcement of a corporate duty although not a party as an individual, but 'only through representation by the company. A stockholder is so far an integral part of the corporation that in view of the law he is privy to the proceedings touching the body of which he is a member;' citing *Sanger v. Upton*, 91 U. S. 56, 58; *County of Morgan v. Allen*, 103 U. S. 498, 509; *Glenn v. Williams*, 60 Md. 93, 116; *Hamilton v. Glenn*, (1889) 85 Va. 901." And further: "The point is taken by the defendant that, under the statute of Virginia, the balance remaining unpaid on subscriptions to the stock was payable as called for or required by the president and directors of the company; that it appears by the amended petition that the contract between the company and the subscribers was that eighty dollars per share was payable 'only in such amounts and at such times

as the same might be required to be paid by said company through its president and board of directors;' and that it is not averred in the amended petition that either the president or any of the directors was a party to the suit in the chancery court of the city of Richmond. But the president and directors stand for the corporation, and it is alleged in the amended petition that the corporation was a party to the amended bill, and that it was duly served with process in the cause in accordance with the laws and practice of the State of Virginia. The corporation sufficiently represented the president and directors in their official capacity, in which alone they were to act in making a call, and it also, as held in *Hawkins v. Glenn*, 131 U. S. 319, sufficiently represented the defendant."

¹ *Vanderwerken v. Glenn*, (1888) 85 Va. 9.

ing an assessment.¹ The fact that the court in which the suit was originally brought ordered an assessment for only part of the unpaid subscriptions, without expressly reserving the right to call for the balance, does not prevent a court of competent jurisdiction, to which the cause is afterwards removed, from making a call.² An assessment made by a receiver pursuant to an *ex parte* order of the court is not conclusive upon a stockholder, but may be questioned by him upon special statutory provisions in an action to recover it.³

§ 569. The same subject continued — Limitation.— In the case of a call by the court, no previous call having been made by the corporation, the statute of limitations does not begin to run against the stockholder's liability on his subscription until the date of the decree ordering the assessment.⁴ For, as

¹ Lamar Ins. Co. v. Gulick, 102 Ill. 41.

² Glenn v. Liggett, (1890) 135 U. S. 533; s. c. 8 Ry. & Corp. L. J. 52.

³ Cuykendall v. Corning, (1882) 88 N. Y. 129; Walker v. Crain, 17 Barb. 128, and Story v. Furman, 25 N. Y. 215, distinguished Hurd v. Tallman, 60 Barb. 272, limited New York Laws 1852, ch. 361, and 1853, ch. 179, — as to manufacturing corporations in Herkimer and Cayuga counties, — does not affect the liability of stockholders of corporations formed under Laws 1848, ch. 40. Hence a receiver appointed in proceedings under said laws of 1852, and 1853, can enforce no greater liability than that imposed by the law of 1848. He can not maintain an action against a stockholder to recover a general assessment, based on the company's entire indebtedness. And if the company, in contemplation of insolvency, has made preferences, neither the trustees nor the receiver can under the proviso, in the law of 1853, exercise the powers conferred by the law of 1852. In an action against a stockholder to recover an assessment, it may be shown that the corpora-

tion, or its trustees, violated this condition. Cuykendall v. Corning, 88 N. Y. 129.

⁴ Hawkins v. Glenn, (1889) 131 U. S. 319; Glenn v. Liggett, (1890) 135 U. S. 533; s. c. 8 Ry. & Corp. L. J. 52; ~~Bohman~~ v. Glenn, (Ala. 1889) 6 So. Rep. 44; Glenn v. Foote, 36 Fed. Rep. 824; Glenn v. Semple, 80 Ala. 159; Glenn v. Williams, 60 Md. 95; Vanderwerken v. Glenn, (1888) 85 Va. 9; Glenn v. Howard, (1889) 81 Ga. 383; s. c. 6 Ry. & Corp. L. J. 197. In the last case it was said: "We are aware that there is a decision to the contrary by Judge Brewer, of the United States circuit, Glenn v. Dorsheimer, 23 Fed. Rep. 695, in which it was held that where an insolvent corporation ceases to do business and assigns all its property, including unpaid stock subscriptions, to trustees for the benefit of its creditors, the liability of its stockholders at once becomes absolute, and the statute of limitation begins to run in their favor and against such creditors and trustees immediately. And this is the only decision to the contrary that we have been able to find directly upon the ques-

between the stockholder and the corporation, it does not lie in the mouth of the stockholder to say, in response to the attempt to collect his subscription for the payment of creditors, that the claim is barred because the company did not discharge its corporate duty in respect to its creditors earlier.¹ Although the occurrence of the necessity of resorting to unpaid stock may be said to fix the liability of the subscriber to respond, he can not be allowed to insist that the amount required to discharge him became instantly payable, though unascertained, and though there was no request or its equivalent for payment.² The law of the State creating the corpo-

tion. Other cases have been referred to by learned counsel who argued the case, which seem to look in that direction — and I must say for myself that there is a great deal of reason in favor of the decision of Judge Brewer; but the weight of authority is unquestionably against the ruling of the court below in this case."

¹County of Morgan v. Allen, 103 U. S. 498; Hawkins v. Glenn, (1889) 131 U. S. 319; Glenn v. Liggett, (1890) 135 U. S. 533; s. c. 8 Ry. & Corp. L. J. 52, in which case the court said: "We are of opinion that the judgment in favor of Liggett must be reversed. The decisions of the circuit court were made before the case of Hawkins v. Glenn, 131 U. S. 319, was decided by this court, on the 13th of May, 1889. All the points urged on the part of the defendant in the present case were fully argued, considered and decided by this court in Hawkins v. Glenn, 131 U. S. 319. The syllabus of that case correctly embodies the rulings of this court in these words: 'In the absence of fraud, stockholders are bound by a decree against their corporation in respect to corporate matters, and such a decree is not open to collateral attack. Statutes of limitation do not commence to run as against subscriptions to stock,

payable as called for, until a call or its equivalent has been had; and subscribers can not object, when an assessment to pay debts has been made, that the corporate duty in this regard had not been earlier discharged.' Rules applicable to a going corporation remain applicable, notwithstanding it may have become insolvent and ceased to carry on its operations, where, as in this case, it continues in the possession and exercise of all corporate powers essential to the collection of debts, the enforcement of liabilities and the application of assets to the payment of creditors.' "

²Glenn v. Liggett, (1890) 135 U. S. 533; s. c. 8 Ry. & Corp. L. J. 52. And here there was a deed of trust made by the debtor corporation for the benefit of its creditors, and it has been often ruled in Virginia that the lien of such a trust deed is not barred by any period short of that sufficient to raise a presumption of payment. Smith v. Railroad Co., 33 Gratt. 617; Bowie v. Society, 75 Va. 300; Hamilton v. Glenn, (1889) 85 Va. 901. This deed was not only upheld and enforced by the decree of December 14, 1880, but also the power of the substituted trustee to collect the assessment by suit in his own name was declared by the

ration governs the rights of its stockholders and creditors, and the statute of another State, prescribing a different period of limitation, can have no application to an action brought in that State to enforce the decree ordering the assessment.¹

§ 570. Payment of calls after transfer.—Where shares of stock have been assigned, but from neglect, or omission from any cause, the assignor remains the nominal owner on the books of the company, there is an implied obligation on the part of the assignee to reimburse him for money paid on calls made by the company on the stock during the time he remains nominal owner.² If the shares have been a second time transferred, the original transferrer may have recourse upon either of the transferees.³ The obligation to indemnify pre-

court of appeals of Virginia in *Lewis v. Glenn*, (1888) 84 Va. 947. See, also, *Railroad Co. v. Glenn*, 28 Md. 287. By the deed the subscriptions, so far as uncalled for, passed to the trustees, and the creditors were limited to the relief which could be afforded under it, while the stockholders could be subjected only to equality of assessment; and, as the trustees could not collect except upon call, and had themselves no power to make one, rendering resort to the president and directors necessary, or, failing their action, then to the courts, it is very clear that the statute of limitation could not commence to run until after the call was made.

¹ *Glenn v. Liggett*, (1890) 135 U. S. 533; s. c. 8 Ry. & Corp. L. J. 52.

² *Brinkly v. Hambleton*, (1887) 67 Md. 169; *Johnson v. Underhill*, 52 N. Y. 203; *Brigham v. Mead*, (1865) 10 Allen, 245; *Lord v. Hutzler*, (1886) 64 Md. 534; *Kellogg v. Stockwell*, 75 Ill. 68; *Castellan v. Hobson*, L. R. 10 Eq. Cas. 47; *Kellock v. Enthoven*, L. R. 9 Q. B. 241; s. c. L. R. 8 Q. B. 458; *Bowring v. Shepherd*, L. R. 6 Q. B. 309; *Davis v. Haycock*, L. R. 4 Ex. 373; *Grissell v. Bristowe*, L. R. 3

C. P. 112; *Chapman v. Shepherd*, L. R. 2 C. P. 228; *Walker v. Bartlett*, 18 Com. B. 845; *Humble v. Langsdon*, 7 Mees. & W. 517; *Morawetz on Corporations*, 2nd ed. § 175. Cf. *Shaw v. Fisher*, 2 De Gex & Sm. 11; s. c. 5 De Gex, M. & G. 596.

³ *Kickalls v. Eaton*, 23 L. T. N. S. 699, as to the first, and as to the second transferee, *Hawkins v. Maltby*, L. R. 3 Ch. 188. The holder of shares in a corporation agreed to sell them, and placed the certificate in the hands of a third party, to be delivered to the vendee on payment of a note given for the stock, but the note was never paid, and the stock remained on the books of the corporation in the name of the vendor. Though the vendee voted on the stock by virtue of a proxy, and the note was subsequently taken by the corporation, but not on account of any transaction between it and him, he was not liable to the corporation for unpaid assessments on the stock. *Cormac v. Western White Bronze Co.*, (1889) 77 Iowa, 32. And where one sold and delivered stock in a corporation, for a certain sum cash, and it was agreed that the vendor should have the option, for

vious holders of the stock is confined to the holders of the shares at the time the call was made by the company.¹ But whether in case a call is made before, but payable after, a transfer has been completed, it should be paid by the transferer, must be largely determined by the circumstances, the contract between the parties, and the statutes;² though in some cases the transferee has been held liable.³ An original stockholder, who has been compelled to pay calls on stock after he has assigned it, is entitled to be subrogated to the rights of the corporation against the delinquent assignee only upon clear proof of acceptance of the transfer by the assignee.⁴

§ 571. Notice of calls.— Whether notice of calls is a prerequisite to an action to enforce their payment is a point upon which the authorities are conflicting. Many well considered cases hold that it is;⁵ while there seems to be a larger array

a time, to take back the stock, on payment of a large sum, and all assessments made after the contract of sale, and the vendor afterwards paid an assessment, and thereafter, before the option expired, notified defendant that he declined to exercise the option or to take back the stock, it was held that the vendor could not recover from defendant the amount of the assessment paid. *Treadway v. Johnson*, 33 Mo. App. 122.

¹ *Brinkley v. Hambleton*, (1887) 67 Md. 169.

² *Schenectady &c. Plank Road Co. v. Thatcher*, 11 N. Y. 102, 113; *North American &c. Assoc. v. Bentley*, 19 L. J. Q. B. 427. See *Thompson on Liabilities of Stockholders*, § 210; *Morawetz on Corporations*, 2nd ed. § 161.

³ *West Philadelphia Canal Co. v. Innes*, 3 Whart. 198; *Aylesbury Ry. Co. v. Mount*, 4 Man. & G. 651; s. c. 5 *Scott's N. R.* 127.

⁴ *Tripp v. Appleman*, (1888) 35 Fed. Rep. 19. In the same case it was decided that the blotter of the company's treasurer, and the stubs of its check-book, both of which contained

entries to the effect that defendant had paid calls on the shares, were inadmissible as evidence, the assignee being a stranger to the corporation. And as between the administrator of the original stockholder and his alleged assignee, who denies having bought the stock or authorized the transfer, the record of the transfer upon the books of the company is not sufficient proof of acceptance by the assignee to render him liable to the estate for calls and assessments paid by it subsequent to the assignment; and this is especially so where the transfer was made under a power of attorney given by the original stockholder, and executed at his instance without the knowledge or consent of the assignee.

⁵ *Braddock v. Philadelphia &c. R. Co.*, 45 N. J. 363; *Granite Roofing Co. v. Michaels*, 54 Md. 65; *Dexter &c. Co. v. Millerd*, 3 Mich. 91; *Hughes v. Antietam Manufacturing Co.*, (1870) 34 Md. 316. See also *Carlisle v. Cahawba &c. R. Co.*, 4 Ala. 70; *Alabama &c. R. Co. v. Rowley*, 9 Fla. 508; *Wear v. Jacksonville &c. R. Co.*, 24 Ill. 593; *Spangler v. In-*

of cases to the contrary.¹ After notice has been given, however, certainly no demand is necessary before bringing suit to collect.² Although when provision is made by statute, charter or by-laws for notice of calls by publication in a gazette or journal, the formalities prescribed must be strictly followed;³ yet all that is generally required in the absence of statutory, charter or by-law provisions as to the form of notice, and the time and manner of serving it, is that for a reasonable interval before the call is due, the shareholders shall have actual knowledge of the amount and day of payment. This may be done verbally, by letter or by newspaper publication.⁴ When notice is given by publication in a journal, it must be proven that the article was actually read by the stockholder.⁵ Ac-

diana &c. R. Co., 21 Ill. 275; Rutland &c. R. Co. v. Thrall, 35 Vt. 536; Essex Bridge Co. v. Tuttle, 2 Vt. 393; Miles v. Bough, 3 Q. B. 845.

¹ Peake v. Wabash R. Co., 18 Ill. 88; Penobscot R. Co. v. Dummer, (1855) 40 Me. 172; s. c. 63 Am. Dec. 654; Eakright v. Logansport &c. R. Co., 13 Ind. 404; Brownlee v. Ohio &c. R. Co., 18 Ind. 68; Smith v. Indiana &c. R. Co., 12 Ind. 61; Breedlove v. Martinsville &c. R. Co., 12 Ind. 114; Johnson v. Crawfordsville R. Co., 11 Ind. 280; New Albany &c. R. Co. v. McCormick, 10 Ind. 499; s. c. 71 Am. Dec. 337; Fisher v. Evansville &c. R. Co., 7 Ind. 407; Ross v. Lafayette &c. R. Co., 6 Ind. 297; New Albany &c. R. Co. v. Pickens, 5 Ind. 247; Lake Ontario &c. R. Co. v. Mason, 16 N. Y. 451; Harlem Canal Co. v. Seixas, 2 Hall, (N. Y.) 504; Illinois River R. Co. v. Zimmer, (1858) 20 Ill. 654; Grubbe v. Vicksburg &c. R. Co., 50 Ala. 398; Eppes v. Mississippi &c. R. Co., 35 Ala. 33; Wilson v. Wells Valley R. Co., 33 Ga. 466; Macon &c. R. Co. v. Vason, (1876) 57 Ga. 314; Danbury &c. R. Co. v. Wilson, 22 Conn. 485.

² Winters v. Muscogee R. Co., 11 Ga. 438; Penobscot &c. R. Co. v. Dummer, (1855) 40 Me. 172; s. c. 63

Am. Dec. 654; Goodrich v. Reynolds, 31 Ill. 491. Cf. Spangler v. Indiana &c. R. Co., 21 Ill. 275, b.

³ Thus a requirement that sixty days' notice be given, is not complied with by publication forty-nine days before. Macon &c. R. Co. v. Vason, (1876) 57 Ga. 314.

⁴ Jeremiah Black, J., in *Lincoln v. Wright*, 23 Pa. St. 76; s. c. 62 Am. Dec. 316; *New Jersey Midland R. Co. v. Strait*, 35 N. J. 322; *Shackleford v. Dangerfield*, L. R. 3 C. P. 407; *Newry &c. R. Co. v. Edmunds*, 2 Ex. Rep. 118; *Mississippi &c. R. Co. v. Gaster*, 20 Ark. 455; *Tomlin v. Tonica &c. R. Co.*, 23 Ill. 429; *Smith v. Tallahassee Plank Road Co.*, 30 Ala. 650, 666; *Braddock v. Philadelphia &c. Co.*, (1883) 45 N. J. 363; *Hall v. United States Insurance Co.*, 4 Gill, (Md.) 484. Cf. *Louisville &c. Co. v. Merreweather*, 5 B. Mon. 13; *Danbury &c. R. Co. v. Wilson*, 22 Conn. 435. A provision for notice by publication "at least sixty days," is complied with by one publication sixty days before. *Muskingum Valley Turnpike Co. v. Ward*, 13 Ohio, 120; s. c. 42 Am. Dec. 191; *Marsh v. Burroughs*, 1 Woods, 463.

⁵ *Alabama &c. R. Co. v. Rowley*, 9 Fla. 508. See *obiter* *Lake Ontario*

cording to the general principle above announced, proof of the fact of mailing is not sufficient; it must be proved to have been received also.¹ For the doctrine of constructive notice does not apply unless by express statutory provision.² But proof that notice of a call was duly mailed to a subscriber has been held to make a *prima facie* case of notification.³ In either case whether it was ever received is a question of fact for the jury.⁴

§ 572. Place and time for payment.—As interest on subscriptions to stock runs from the time that the call is due,⁵ and as notice of the time of payment must be reasonable,⁶ even if no specified notice is required to be given,⁷ the resolution for a call must state the time at which it is to be paid.⁸ The di-

&c. R. Co. v. Mason, 16 N. Y. 451; Tomlin v. Tonica &c. R. Co., 23 Ill. 429; Rutland &c. R. Co. v. Thrall, 35 Vt. 536; Unthank v. Henry County Turnpike Co., 6 Ind. 125.

¹ Hughes v. Antietam Manuf. Co., (1870) 34 Md. 316.

² Hughes v. Antietam Manuf. Co., (1870) 34 Md. 316.

³ Braddock v. Philadelphia &c. R. Co., (1883) 45 N. J. L. 363. *Acc.* Eastern Union Ry. Co. v. Symonds, 6 Ry. Cas. 578; Jones v. Sisson, 72 Mass. 228. See also Trotter v. Maclean, 13 Ch. Div. 574; Reid v. Harvey, 5 Q. B. Div. 184.

⁴ Braddock v. Philadelphia &c. R. Co., 45 N. J. L. 363.

⁵ Gould v. Oneonta, 71 N. Y. 298; Burr v. Wilcox, 22 N. Y. 551. The English Companies Clauses Act of 1845 provides that "if before or on the day appointed for payment, any shareholder do not pay the amount of any call to which he is liable, then such shareholder shall be liable to pay interest for the same at the rate allowed by law from the day appointed for the payment thereof to the time of actual payment." The Companies Clauses Act, 1845, 8 Vic. ch. 16, § 23. A special claim

for interest is not necessary in an action under this act; but the amount claimed should cover the interest. Browne & Theobald's Ry. Law, 78, citing Southampton Dock Co. v. Richards, 1 Macn. & G. 448; London &c. Ry. Co. v. Fairclough, 2 Macn. & G. 674.

⁶ Fairfield &c. Co. v. Thorp, 13 Conn. 173. *Cf.* Hall v. United States Insurance Co., 4 Gill; (Md.) 484.

⁷ Fairfield &c. Co. v. Thorp, 13 Conn. 173. See § 594, *infra*, as to notice.

⁸ *In re Cawley & Co.*, 42 Ch. Div. 209. In an editorial article, "What is necessary to a good Call on Shares," (1890) Law Times, 166, this case is discussed as follows: In that case one of the articles laid it down "that the amount payable on the shares in the capital shall be payable at the bankers of the company, or at such other place as the board shall appoint, with such deposit and in such instalments and manner, and at such time, as shall be appointed from time to time by the board." And another said that "all calls in respect of shares shall be deemed to be made at the time when the resolutions authorizing them are

rectors' resolution need not state the place of payment, neither is it necessary that it should specify the person to whom payment shall be made. It is sufficient that these matters of de-

passed by the board." This being so, a resolution was passed by the board in the following terms: "That the remainder of the capital be and is hereby called up, payable as follows: As to shares numbered, &c., the sum of 5s. per share payable on the — day of —, and as to the whole of the shares of the company" (except certain shares which had been issued as fully paid up) "5s. per share payable on the — day of —, and 5s. per share payable on the — day of —." The dates of the calls were left in blank in the resolution, the chairman deposing that he did not think it necessary to insert the dates or to order immediate notice of the calls to be sent out, because he was still hoping that other financial arrangements might be made which would dispense with the necessity of enforcing the calls. Before the next meeting of the board, three days later, the three blanks in the minutes of the resolution were most improperly filled in by the secretary by the insertion of three proximate dates. It appeared that the secretary had no instructions to alter the minutes, and that he inserted the dates of the calls in the exercise of his own discretion. At the next board meeting the minutes of the previous meeting, with the dates of the calls thus inserted, were "read and confirmed." On these facts the Court of Appeal distinctly laid down that a resolution for a call, to be valid, must state not only the amount of the call, but also the time at which it is to be paid; this being so, in this case there was no proper call made until the second resolution fixing the

date of payment, and that the second resolution did not, in point of date, relate back to the first. The opinion of Lord Esher, M. R., was that at the first of the two board meetings there was no call whatever made. The directors could not, of course, make a call without a resolution, and there could be no valid call in this company until the time and place for its payment had been appointed by the board; that is to say, until it had been resolved by the directors that the call should be payable in certain instalments, and in a certain manner, and at a certain time appointed by the board. The article quoted says, "as shall be appointed from time to time." That means that the directors are not bound to make a call of the whole of the unpaid capital, but they may make a call of part only, and at another time they may deal with the rest, so that there may be successive calls until the whole of the capital has been called up. After making a call, as, for instance, of 5s. per share, if a particular number of shareholders did not pay on the day appointed, the directors might appoint another day, but only after they had made a valid appointment of a certain day in the first instance; then, owing to intervening circumstances, they might appoint a further day on which those who had been called upon to pay on the first day, and had not paid, might pay the call. Failing payment on that day, the remedy of the directors was either by action or by forfeiture. And again, Lord Justice Fry added that, in this company, according to the articles which we have

tail be set forth in the notice sent to the shareholders; and when not specified therein, the money is deemed payable to the treasurer of the company at his usual place of business.¹

§ 573. Irregularities in calls — Acquiescence — Estoppel.

There are no formal requisites to the validity of a call.² A resolution by the directors showing their intent to render payable a part or all of unpaid subscription constitutes a call, or as it is frequently loosely termed an "assessment."³ Accord-

quoted, the fixing of the time was of the essence in the making of a call: "In fact," he added, "I scarcely know what the making of a call is, except the fixing of the time at which the money is to be paid. I am clearly of opinion that, according to the constitution of the company, no call was made until the time for payment was fixed. All the articles in fact show that the fixing of the time was an essential part of the call." It will be observed that the Lord Justice was careful to guard himself by the articles of the company, and he laid down no general proposition apart from the articles. And Lord Justice Cotton did not advert to the point. But the Master of the Rolls added a postscript to his judgment, which effectually prevents the decision in this case being rested merely on the particular articles. Lord Esher said: "I do not wish it to be supposed that my decision in this case rests only on the articles. I take it to be of the very essence of a call that the time and place for payment should be determined." The time of the call can not, it seems, be fixed by a mere verbal direction to the secretary of the company. *Johnson v. Lyttle's Iron Agency*, 5 Ch. Div. 687. Though a resolution that a call "shall be made" on a future day is good, and the time, place and manner of payment may be fixed by a distinct act

after the original resolution. *Sheffield &c. Ry. Co. v. Woodcock*, 7 Mees. & W. 574.

¹ *Danbury &c. R. Co. v. Wilson*, (1853) 22 Conn. 435; *Great North. &c. Ry. Co. v. Biddulph*, 7 Mees. & W. 243. That the resolution need not specify the time and place of payment, see: *Rutland &c. R. Co. v. Thrall*, 35 Vt. 536; *Great North. &c. Ry. Co. v. Biddulph*, 7 Mees. & W. 243. That the resolution need not state the person to whom it shall be payable, see: *Great North. &c. R. Co. v. Biddulph*, 7 Mees. & W. 243. So also notice to pay to the treasurer of the company is a sufficient designation of the place of payment, namely, at his office. *Muskingum Valley Turnpike Co. v. Ward*, 13 Ohio, 120; s. c. 42 Am. Dec. 191. *Contra*, *Dexter &c. Plank Road Co. v. Millard*, 3 Mich. 91.

² *Fox v. Allensville &c. Turnpike Co.*, 46 Ind. 31; *Andrews v. Ohio &c. R. Co.*, 14 Ind. 169.

³ *Budd v. Multnomah Street R. Co.*, (1887) 15 Oregon, 413; s. c. 3 Am. St. Rep. 169. The word call is capable of three meanings. It may mean either the resolution by the corporate authorities that payment be made upon the subscriptions, or the notification to the subscribers, or it may be used to refer to the time when payment becomes due. *Ambergate &c. Ry. Co. v. Mitchell*, 4 Ex. Rep. 540. *Cf.* *Newry &c. Ry.*

ingly a call may be valid notwithstanding a failure to enter the resolution in the minutes of the meeting.¹ A call being nothing more than an official declaration that the sums subscribed are required to be paid,² it has been said that a shareholder shall not take advantage of any irregularity therein;³ nor may a director who participated in making it set up its informalities.⁴ A call is scarcely anything more than the fixing of the time when money is to be paid.⁵ The making of the call, or informalities in the notice thereof, may be waived by the subscriber, either expressly or by implication from certain acts.⁶ So also errors in making a call may be cured by a subsequent call after the liability has accrued and before action brought.⁷ As a further matter, not merely formal, when calls are made by the directors, it is essential to their validity that they be made by a majority of a quorum.⁸ Accordingly, in England, if directors have been illegally elected, their calls and forfeitures may be set aside.⁹ But in this country it is sufficient that the calls were made by directors *de facto*.¹⁰ And

Co. v. Edmunds, 2 Ex. Rep. 118; Braddock v. Philadelphia &c. R. Co., (1883) 45 N. J. 363. But either meaning taken must be consistently adhered to. Thus the interval between the making of calls can not be reckoned from the time the call is payable in one case, to the time when the resolution for the call is made in the other. Ambergate &c. Ry. Co. v. Mitchell, (1849) 4 Ex. 540.

¹ Hays v. Pittsburgh &c. R. Co., (1860) 38 Pa. St. 81.

² Braddock v. Philadelphia &c. R. Co., (1883) 45 N. J. 363. Cf. Spangler v. Indiana &c. R. Co., 21 Ill. 275, b.

³ *In re* British Sugar Ref. Co., 3 Kay & J. 408; Richards v. Southampton Dock Co., 1 Man. & Gr. 448; s. c. 2 Ry. Cas. 215, 234.

⁴ Hays v. Pittsburgh &c. R. Co., (1860) 38 Pa. St. 81.

⁵ *In re* Cawley & Co., 42 Ch. Div. 209.

⁶ Macon &c. R. Co. v. Vason, (1876) 57 Ga. 314; Rutland &c. R. Co. v. Thrall, 35 Vt. 536. But it has been held that the vote of a city to pay a call does not waive its invalidity. Pike v. Bangor &c. R. Co., 68 Me. 445. And payment of a portion of the subscription is no waiver of the right to require calls to be made for the balance. Grosse Isle Hotel Co. v. L'Anson, (1881) 43 N. J. L. 442.

⁷ Philadelphia &c. R. Co. v. Hickman, (1857) 28 Pa. St. 318.

⁸ Hamilton v. Grand Rapids &c. R. Co., (1859) 13 Ind. 347; Price v. Grand Rapids &c. R. Co., 13 Ind. 58; Cowley v. Grand Rapids &c. R. Co., 13 Ind. 61; Pike v. Bangor &c. R. Co., 68 Me. 445; Silver Hook Road v. Greene, 12 R. I. 164.

⁹ *In re* Garden Gully &c. Co., L. R. 1 App. Cas. 39; Swansea Dock Co. v. Lewien, 20 L. J. Ex. 447.

¹⁰ Macon &c. R. Co. v. Vason, (1876) 57 Ga. 314; Eakright v. Logansport &c. R. Co., (1851) 13 Ill. 404; Stein-

an allegation that the directors were duly elected is unnecessary.¹

§ 574. **Tender of certificates.**—An action to enforce payment of subscriptions may be maintained without a previous tender of stock certificates.² And this is true even though the contract may provide for their issue “upon payment.”³ A willingness, however, to deliver the certificates must be averred in the company’s pleadings, in actions for the whole amount subscribed or to enforce payment of the last instalment.⁴

§ 575. **Evidence.**—The books of a corporation are competent evidence to prove that one is a stockholder, and the state of his account in respect to his shares.⁵ They are *prima facie*

mitz v. Versailles R. Co., (1877) 57 Ind. 457; Johnson v. Crawfordsville R. Co., 11 Ind. 280.

¹ Steinmitz v. Versailles &c. Turnpike Co., (1877) 57 Ind. 457; Miller v. Wild Cat &c. Co., 52 Ind. 51.

² Paducah & M. R. Co. v. Parks, (1888) 86 Tenn. 500; Fulgan v. Macon &c. R. Co., 44 Ga. 597. Cf. Cheltenham &c. Ry. Co. v. Daniel, 2 Eng. Ry. Cas. 723. But see St. Paul &c. R. Co. v. Robbins, 23 Minn. 439.

³ Paducah & M. R. Co. v. Parks, (1888) 86 Tenn. 500.

⁴ James v. Cincinnati &c. R. Co., 2 Disn. 261; Clark v. Continental &c. Co., 57 Ind. 135.

⁵ Turnbull v. Payson, 95 U. S. 418; Glenn v. Orr, (1887) 96 N. C. 413; Vanderwerken v. Glenn, 85 Va. 9; Barrington v. Pittsburgh &c. R. Co., 34 Pa. St. 358, 364; Comfort v. Leland, 3 Whart. (Pa.) 81, 88. In a case in which it appeared that a person had agreed to subscribe for some of the shares of the stock of the company, under the name it then bore; that by his proxy he participated in the organization of the company; and that, on motion of his proxy, the corporate name was changed to that borne at the time of

the assessment, his name also appearing on the company’s books as holder of the stock, it is sufficient evidence of his being a stockholder of the present company. In that action the books of the corporation being identified by its superintendent and trustee in an assignment, and having been previously proved before a commissioner in a chancery suit to which the corporation was a party, and it being shown that the books now offered were the same used by the commissioner, upon which his report had been made, which report was confirmed, in the absence of any circumstances tending to discredit the books they were admitted as evidence. Vanderwerken v. Glenn, (1888) 85 Va. 9. And where a statute provided that a person in whose name shares of stock stand on the books of a company shall be deemed the owner thereof, as regards the company, and a company’s stock ledger showed that five certificates of fifty shares each were issued in the name of a person who testified that he transferred three of these certificates to third persons, but who failed to have them transferred to their own names

evidence and throw the burden of proving the contrary upon the person whose name or account so appears;¹ particularly when the genuineness of the subscriptions in question is not denied, and another assessment levied by the same authority as the one resisted, has been paid.² The entry in the record book of the board of directors of a turnpike company, signed by the secretary, is competent evidence of the act of the board requiring payment from subscribers to capital stock.³ But when an action is brought to enforce payment of a call, proof must be given that it was made by the proper corporate authorities. That the notice itself declares the call to be made by the board of directors, is no proof of the fact.⁴ An authorized call for a subsequent instalment is evidence that the former had been made by authority, the former being necessarily implied by the later call.⁵ But if the directors rely upon the fact that a former call is void, they must prove it or show that it has not been paid.⁶ An action for calls under the English Companies Clauses Act of 1845, will not lie against a person who is not shown to be the holder of some specific shares.⁷ This act provides that it is sufficient for the company to prove, in an action to enforce the payment of calls, that the defendant at the time they were made was the holder of one or more shares, and that the call was in fact made and such notice thereof given as is directed by the statute or the special act of incorporation; and it is not necessary to prove the appointment of the directors who made the call, nor any other matter whatsoever.⁸

on the books; and that of the remaining shares, he transferred fifty to other persons, the transfer being made on the books, it was held that, as to creditors, he still remained the owner of two hundred shares. *Hawkins v. Glenn*, (1889) 131 U. S. 819.

¹*Turnbull v. Payson*, 95 U. S. 418; *Hamilton &c. Co. v. Rice*, 7 Barb. 157; *Coffin v. Collins*, 17 Me. 440; *Whitman v. Granite Church*, 24 Me. 256; *Wood v. Coosa &c. R. Co.*, (1861) 32 Ga. 273; *Hoagland v. Bell*, 36 Barb. 57.

²*Lehman v. Glenn*, (1889) 87 Ala. 618.

³*Fox v. Allensville &c. Co.*, (1874) 46 Ind. 31.

⁴*New Jersey Midland Ry. Co. v. Strait*, (1871) 35 N. J. 323.

⁵*Barrington v. Pittsburgh &c. R. Co.*, (1859) 34 Pa. St. 358.

⁶*Welland Ry. Co. v. Berrie*, 6 Hurl. & N. 416.

⁷*Wolverhampton &c. Co. v. Hawkesford*, 6 C. B. N. S. 336; *Companies Clauses Act of 1845*, 8 Vic. ch. 16, § 26.

⁸8 Vic. ch. 16, § 27.

§ 576. **Defenses to actions upon calls** — (a) **In general.**— A shareholder sued by the corporation for instalments of his subscription can not question the existence of the corporation or the regularity of its organization,¹ nor dispute the necessity for the calls.² He is not released from liability on his subscription because the corporation changed its name after he subscribed.³ Nor is it a defense to an action on a subscription to the stock of a company organized to carry on the business contemplated in the subscription, and engaged in that business only, that it might, under the act of incorporation, have carried on other business.⁴ It is no defense that some of those subscribing were notoriously insolvent at the time.⁵ Where the directors of an insurance company compromised and paid the liabilities of the corporation at less than their amounts, it was held that this did not free a stockholder from liability for a call to pay debts upon winding up.⁶ That the property of the company has been seized by the State under execution can not be set up in defense to a suit upon a subscription.⁷

§ 577. (b) **Infancy.**— It is no answer to an action for calls that the shareholder was an infant at the time of registration, where nothing more is alleged.⁸ For allowing shares to remain in his name after majority is a ratification of his liability to the company.⁹ And to avoid liability he must also show that while he was an infant, or within a reasonable time after coming of age, he repudiated the shares.¹⁰

§ 578. (c) **Accommodation subscription.**— The holder of shares may plead in defense to an action against him by

¹ McCune Mining Co. v. Adams, (1886) 35 Kan. 193.

² Chouteau Ins. Co. v. Floyd, 74 Mo. 286.

³ Howard v. Glenn, (Ga. 1890) 11 S. E. Rep. 610.

⁴ Haskell v. Worthington, (1888) 94 Mo. 560.

⁵ Jewell v. Rock River Paper Co., 101 Ill. 57.

⁶ Chouteau Ins. Co. v. Floyd, (1881) 74 Mo. 286.

⁷ Mullins v. North & Co. R. Co., (1875) 54 Ga. 580.

⁸ Cork & Co. Ry. Co. v. Cazenove, 10 Q. B. 935; Leeds & Co. Ry. Co. v. Fearnley, 4 Ex. 26; London & Co. Ry. Co. v. McMichael, 20 L. J. Ex. 97; s. c. 5 Ex. 114.

⁹ Cork & Co. Ry. Co. v. Cazenove, 10 Q. B. 935.

¹⁰ Newry & Co. Ry. Co. v. Coombe, 3 Ex. 565; Dublin & Co. Ry. Co. v. Black, 22 L. J. Ex. 94; s. c. 8 Ex. 181.

the company that the stock was issued to him as a gratuity, and that neither expressly nor by implication did he promise to pay for it.¹ Accordingly, one who subscribes to the capital stock of a corporation solely in order to enable it to obtain a certificate of organization, under an agreement with the other subscribers that he is not to be liable on the stock, and is not to be required to pay assessments, is not liable to an assessment thereon as against the other subscribers until it becomes necessary to assess it in order to pay debts of the corporation.² But a written agreement to pay assessments on the stock contained in the book of subscription will bind the signer, notwithstanding a verbal understanding or agreement that some other member of the corporation will release him from the stock and liability thereon.³

§ 579. (d). **Bankruptcy of shareholder.**— If calls were made and remained unpaid prior to the bankruptcy of a stockholder, undoubtedly they would be carried by his discharge in bankruptcy, but his discharge is no bar to an action for an instalment subsequently called for, the unpaid subscription not constituting such a debt or liability as is provable against his estate in bankruptcy.⁴ If, however, the company is in liquidation at the time of his bankruptcy, the estimated amount of future calls may be proved.⁵ In an action by a trustee under an assignment from an insolvent corporation to recover an assessment on its stock, a finding that defendant never subscribed for the shares, and was not liable to pay the assessment, is conclusive in defendant's favor, and the ques-

¹ Christensen v. Eno, (1887) 106 N. Y. 97.

² Winston v. Dorsett & Co., (1889) 129 Ill. 64.

³ Topeka Manuf'g Co. v. Hale, (1888) 39 Kan. 23.

⁴ Glenn v. Howard, (1886) 65 Md. 40.

⁵ General Discount Co. v. Stokes, 35 L. J. C. P. 25; s. c. 17 C. B. N. S. 765; s. c. 5 New Rep. 134; *In re* Monmouthshire Banking Co., *Ex parte* Nicholas, 21 L. J. Q. B. 64; s. c. 2 D. M. & G. 271; Chapple's Case, 4

De G. & Sm. 400; *Ex parte* Greenhills, 5 De G. & Sm. 599; s. c. 21 L. J. Ch. 773; Financial Corporation v. Lawrence, 17 W. R. 854; Parbury's Case, 30 L. J. Ch. 512; Wyland Steam Fuel Co. v. Street, 10 Ex. 849; s. c. 24 L. J. Ex. 208; *Ex parte* Hastie, 38 L. J. Ch. 43, 233; s. c. L. R. 7 Eq. 3; s. c. 4 Ch. 274; Martin's Patent Anchor Co. v. Morton, L. R. 5 Q. B. 306; 37 L. J. Q. B. 98; South Staffordshire R. Co. v. Burnside, 20 L. J. Ex. 120; s. c. 5 Ex. 129; Anglo Greek Steam Naviga-

tion of the effect of a discharge in bankruptcy is wholly immaterial.¹

§ 580. (e) **Set-off.**—In the case of stock issued as fully paid up, but for which less than par was paid, the holder can not set off against the creditor of the corporation a debt due himself from the corporation.² And when a subscriber to the capital stock of a corporation is sought to be held on a judgment against the corporation to the amount of his unpaid subscription he can not set off against that judgment what the corporation may owe him for services, rent of property, and such like demands.³ And where one had a contract with a corporation to build its works for a certain sum, part of which was to be paid in stock, which he, like other stockholders, was to take at fifty per cent. of its par value, and a judgment creditor of the company sought to subject defendant to liability, by creditors' bill, on unpaid stock which he had taken in pursuance of his contract with the company, it was held that the creditor was not bound by the contract be-

tion Co., *Ex parte Carralli*, L. R. 4 Ch. 174; *Ex parte King*, L. R. 4 Eq. 566; s. c. 3 Ch. 10.

¹ *Glenn v. Sumner*, (1889) 132 U. S. 153.

² *Boulton & Co. v. Mills*, (1889) 78 Iowa, 460; s. c. 6 Ry. & Corp. L. J. 417.

³ *Singer v. Given*, 61 Iowa, 93. In *Boulton & Co. v. Mills*, (1889) 78 Iowa, 460, the court said: "In *Thomp. Liab. Stockh.* § 381, it is said that a 'stockholder can not, in a proceeding against him by or on behalf of a creditor or creditors, set off a debt due to him by the corporation.' An examination of the authorities cited in support of the respective views of these text-writers has led us to the conclusion that we ought not to overrule the case of *Singer v. Given*, 61 Iowa, 93. It is a fundamental principle that the capital stock of a corporation is in the nature of trust property held for the benefit of creditors. As there

is ordinarily no individual liability of the stockholder in excess of his obligation to pay in full for his stock, it appears to us manifestly unjust to allow him to set off his claim as a creditor against his liability as a stockholder. If permitted to do so, his claim as a creditor might be paid in full while the other creditors would receive only a part of the amount due them. It is true a stockholder has a right to deal with a corporation the same as any other person, and, if sued by the corporation for unpaid instalments on his stock, he may have the right to set off debts due to him from the corporation. But as against the claim of a mere creditor, who has the right to demand that the capital stock shall be kept unimpaired for the payment of creditors, it is apparent that the rights of the parties are quite different. The debt due to a stockholder ought not to be held as superior to the claims of creditors."

tween the defendant and the company, as to the price for the works, and that only to the extent of their reasonable value could he recoup himself against the unpaid balance on the par value of the stock.¹

§ 581. (f) **The statute of limitations.**—In England the liability for calls being created by statute, the limitation thereon is twenty years.² And it has been held in this country that stockholders in a bank can not oppose the statute of limitations to the claim of creditors to have the stock paid up, it being a continuing trust and confidence to which the statute has no application.³ In any case a right of action to recover instalments of a subscription to corporate stock, does not accrue until a call is made, and the statute of limitations does not begin to run until that time or until the corporation has ceased to be a going concern.⁴ And in Pennsylvania the rule is, that although the statute does not begin to run against a subscription until a call has been made, yet the call must have been made within six years, or the delay satisfactorily accounted for, or else a recovery on the subscription is barred.⁵

§ 582. **Calls after consolidation.**—After several companies have consolidated, the new company may maintain actions against the stockholders of the old companies who have become stockholders of the new, for calls on their shares.⁶ The

¹ *Shickle v. Watts*, (1888) 94 Mo. Fed. Rep. 695; s. c. 24 Fed. Rep. 410. 536; *Glenn v. Priest*, 28 Fed. Rep. 907.

² *Cork &c. Ry. Co. v. Goode*, 22 L. J. C. P. 193; s. c. 13 C. B. 826.

³ *Payne v. Bullard*, 23 Miss. 88; s. c. 55 Am. Dec. 74.

⁴ *Gibson v. Columbia &c. Co.*, (1868) 18 Ohio St. 396; *Scovill v. Thayer*, (1881) 105 U. S. 143, 155; *Curry v. Woodward*, 53 Ala. 371; *Harmon v. Pagé*, 62 Cal. 448; *Glenn v. Saxton*, 68 Cal. 353; *Glenn v. Williams*, (1883) 60 Md. 93; *Payne v. Bullard*, 23 Miss. 88; s. c. 55 Am. Dec. 74; *Thompson v. Reno Sav. Bank*, 19 Nev. 171; s. c. 3 Am. St. Rep. 881; *Allibone v. Hayes*, 45 Pa. St. 43; *Glenn v. Dorsheimer*, 23

⁵ *Pittsburgh &c. R. Co. v. Byers*, 32 Pa. St. 22; s. c. 72 Am. Dec. 770; *McCully v. Pittsburgh R. Co.*, 32 Pa. St. 25; *Pittsburgh &c. R. Co. v. Graham*, 36 Pa. St. 77.

⁶ *Cork &c. R. Co. v. Patterson*, 18 C. B. 414; *Fisher v. Evansville &c. R. Co.*, 7 Ind. 407; *Hanna v. Cincinnati &c. R. Co.*, 20 Ind. 30; *Washburn v. Cass County*, 3 Dill. 251; *Swartwout v. Michigan &c. R. Co.*, 24 Mich. 389; *Wells v. Rodgers*, 60 Mich. 525; *Cooper v. Shropshire Union R. &c. Co.*, 13 Jur. 443; *Foss v. Harbottle*, 2 Hare, 461; s. c. 7 Jur.

new shareholders, however, can not be sued for assessments on their new stock until the organization of the new company has been lawfully perfected.¹ Moreover, calls made by the original companies, remaining unpaid at the time of consolidation, are also payable to the consolidated corporation, and payment thereof may be enforced by the latter as if the calls had been originally made by it.² But the stockholder is not precluded from questioning the validity of the steps which have led up to the pretended consolidation.³ For unless a consolidation be authorized, the new company can not enforce the payment of calls on the stock of the former.⁴ It seems, too, that the corporation must prove its corporate existence unless the shareholder has in some way recognized it.⁵

§ 583. **Pleading and practice.**—In actions to enforce the payment of calls, facts sufficient to show that they are due and payable must be alleged in the pleadings.⁶ As each contract is to be separately construed and to be in no way affected by the terms of other subscriptions,⁷ an action against subscribers jointly to enforce the payment for stock will not lie, for the contract of subscription is not joint but several.⁸ And accordingly when one person makes two subscriptions in different capacities, as an individual and as a trustee, actions to enforce payment must be brought separately upon each.⁹ The

163; *Exeter &c. R. Co. v. Buller*, 11 Jur. 527; *Lord v. Cooper Miners' Co.*, 18 L. J. Ch. 65; *Mozley v. Alston*, 1 Phil. Ch. 790; s. c. 11 Jur. 315; *Mansfield &c. R. Co. v. Brown*, 26 Ohio St. 223; *Mansfield &c. R. Co. v. Stout*, 26 Ohio St. 241, 255; *Mansfield &c. R. Co. v. Drinker*, 30 Mich. 124.

¹ *Midland &c. R. Co. v. Leech*, 3 H. L. Cas. 872.

² This is expressly enacted in England. 26 & 27 Vic. ch. 92, § 52.

³ *Tuttle v. Michigan Air Line R. Co.*, 35 Mich. 247, 249; *Peninsular R. Co. v. Tharp*, 28 Mich. 506; *Mansfield &c. R. Co. v. Brown*, 26 Ohio St. 223; *Mansfield &c. R. Co. v. Stout*, 26 Ohio St. 241.

⁴ *Thrasher v. Pike County R. Co.*, 25 Ill. 393.

⁵ *Mansfield &c. R. Co. v. Drinker*, 30 Mich. 124, and cases cited *supra*.

⁶ *Bethel &c. Co. v. Bean*, (1870) 58 Me. 89; *Spangler v. Indiana &c. R. Co.*, 21 Ill. 276; *Peake v. Wabash R. Co.*, 18 Ill. 88.

⁷ *Connecticut &c. R. Co. v. Bailey*, 24 Vt. 465.

⁸ *Erie &c. R. Co. v. Patrick*, 2 Abb. App. Cas. 72; s. c. 2 Keyes, 256; *Price v. Grand Rapids &c. R. Co.*, 18 Ind. 137; *Herron v. Vance*, 17 Ind. 595.

⁹ *Erie &c. R. Co. v. Patrick*, 2 Keyes, 256; s. c. 2 Abb. App. Cas. 72.

right to recover unpaid subscriptions for stocks vests on dissolution in the officers who by statute represent the corporation, and not in creditors, unless otherwise provided.¹ But where a statute gives creditors a right of action against the stockholders at the time of dissolution, a personal liability is created, which may be enforced by a common-law action in or out of the State of the corporation's domicile.² The measure of damages in an action to enforce payment of subscriptions is the amount of the call with interest from the time of default of payment.³ It is not a sufficient defense to allege that the call was unnecessary; for, provided the directors in making it do not exceed their powers, the court will not inquire into the necessity of it nor into the motives prompting it.⁴

§ 584. The company's remedy upon unpaid calls.—The contract of subscription is founded upon the consideration of the pecuniary advantages and the profits anticipated through membership in the company;⁵ although the mutual promises of the subscribers, and the implied engagement of the company to issue the stock, have also been held to support the contract,⁶ as also have the prior acts of the parties, and the partial execution of the purpose of incorporation.⁷ In case of the

¹ *Savings Assoc. v. O'Brien*, (1889) 51 Hun, 45.

² *Savings Assoc. v. O'Brien*, (1889) 51 Hun, 45; *Pollard v. Bailey*, 20 Wall. 526; *Bank v. Francklyn*, (1887) 120 U. S. 747; *Flash v. Connecticut*, 109 U. S. 371; *Corning v. McCullough*, 1 N. Y. 47; *Perry v. Turner*, 55 Mo. 418; *State Savings Assoc. v. Kellogg*, (1876) 63 Mo. 540; s. c. 52 Mo. 583; *Donnelly v. Mulhall*, 12 Mo. App. 139.

³ *Rand v. White Mountain R. Co.*, (1860) 40 N. H. 79; *Upton v. Burnham*, 3 Biss. C. C. 520; *Gould v. Oneonta*, 71 N. Y. 298; *Southern &c. R. Co. v. Moravia*, 61 Barb. 180; 8 Vic. ch. 16, § 25.

⁴ *Oglesby v. Attrill*, (1881) 105 U. S. 605.

⁵ *Selma &c. R. Co. v. Tipton*, 5 Ala. 787; *Lake Ontario &c. R. Co.*

v. Mason, (1857) 16 N. Y. 451, 463; *Buffalo &c. R. Co. v. Dudley*, 14 N. Y. 336; *Schenectady &c. R. Co. v. Thatcher*, 11 N. Y. 102, 108; *Thigpen v. Mississippi Central R. Co.*, 32 Miss. 348; *New Albany &c. R. Co. v. Fields*, 10 Ind. 187; *Fry v. Lexington &c. R. Co.*, 2 Met. (Ky.) 314; *Hartford &c. R. Co. v. Kennedy*, 12 Conn. 499. *Cf.* *East Tennessee &c. R. Co. v. Gammon*, 5 Sneed, (Tenn.) 567; *Danbury &c. R. Co. v. Wilson*, 22 Conn. 435.

⁶ *Bullock v. Falmouth &c. Co.*, (1887) 85 Ky. 184; *Twin Creek &c. Co. v. Lancaster*, 79 Ky. 552; *St. Paul &c. R. Co. v. Robbins*, 23 Minn. 439.

⁷ *Kennebec &c. R. Co. v. Palmer*, 34 Me. 366. *Cf.* *McCully v. Pittsburgh &c. R. Co.*, 32 Pa. St. 25; *Miller v. Wild Cat &c. Co.*, 52 Ind.

failure of a stockholder to pay legal demands on account of his stock, the corporation may ordinarily bring an action for breach of contract.¹ The remedy of forfeiture is cumulative merely.² Accordingly whether the law as in some States implies from the subscription itself a promise to pay for the shares of stock, or whether there is an express promise to pay, the statute conferring upon the company authority to forfeit and sell the shares of delinquent stockholders, does not by implication exclude the common-law remedy for the enforcement of payment.³ But unless both remedies are expressly conferred by statute,⁴ it may not avail itself of both. It can not, after declaring the stock forfeited, sue the shareholder for the balance which the sale of his shares failed to pay.⁵ In

51, 64; *Parker v. Northern &c. R. Co.*, 33 Mich. 23; *Illinois River R. Co. v. Zimmer*, 20 Ill. 654.

¹ *Rand v. White Mountain R. Co.*, (1860) 40 N. H. 79.

² *Dexter &c. Co. v. Miller*, 3 Mich. 91; *Hughes v. Antietam &c. Co.*, 34 Md. 316; *Price v. Grand Rapids &c. R. Co.*, 18 Ind. 137; *Herron v. Vance*, 17 Ind. 595; *Thompson v. Reno Savings Bank*, (1885) 19 Nev. 103; s. c. 3 Am. St. Rep. 881.

³ *Hightower v. Thornton*, (1850) 8 Ga. 486; s. c. 52 Am. Dec. 412; *Selma &c. R. Co. v. Tipton*, 5 Ala. 787; s. c. 39 Am. Dec. 344; *Spear v. Crawford*, 14 Wend. 20; s. c. 28 Am. Dec. 513; *New Hampshire &c. R. Co. v. Johnson*, 30 N. H. 390; s. c. 64 Am. Dec. 300; *Rutland &c. R. Co. v. Thrall*, (1862) 35 Vt. 536; *Connecticut &c. R. Co. v. Bailey*, 24 Vt. 465; s. c. 58 Am. Dec. 181; *Greenville &c. R. Co. v. Smith*, (1852) 6 Rich. 91; *Charlotte &c. R. Co. v. Blakely*, 3 Strob. 245; *Greenville &c. R. Co. v. Cathcart*, 4 Rich. 89; *Mexican Gulf &c. R. Co. v. Vivant*, 6 Rob. (La.) 305; *Boston &c. R. Co. v. Wellington*, (1873) 113 Mass. 79; *White Mountains &c. R. Co. v. Eastman*, 34 N. H. 124, 147;

Hartford &c. R. Co. v. Kennedy, 12 Conn. 499; *Peoria &c. R. Co. v. Elting*, 17 Ill. 429; *Ryder v. Alton &c. R. Co.*, 13 Ill. 516; *Klein v. Alton &c. R. Co.*, 13 Ill. 514; *Barnet v. Alton &c. R. Co.*, 13 Ill. 504; *Spangler v. Indiana &c. R. Co.*, (1859) 21 Ill. 276; *Dayton v. Borst*, (1865) 31 N. Y. 435; *Rensselaer &c. R. Co. v. Witzel*, 21 N. Y. 56; *Lake Ontario &c. R. Co. v. Mason*, (1857) 16 N. Y. 451; *Rensselaer &c. R. Co. v. Barton*, 16 N. Y. 457; *Buffalo &c. R. Co. v. Dudley*, 14 N. Y. 336; *Troy &c. R. Co. v. McChesney*, 21 Wend. 296; *Ogdensburgh &c. R. Co. v. Frost*, 21 Barb. 541; *Troy &c. R. Co. v. Tibbets*, 18 Barb. 297; *Troy &c. R. Co. v. Kerr*, 17 Barb. 581; *Northern R. Co. v. Miller*, 10 Barb. 260; *Mann v. Currie*, 2 Barb. 294; *Beene v. Cahawba &c. R. Co.*, 3 Ala. 660. Cf. *Note to Payne v. Bullard*, 55 Am. Dec. 74, 77; s. c. 23 Miss. 88.

⁴ *New Hampshire Central R. Co. v. Johnson*, (1885) 30 N. H. 390; s. c. 64 Am. Dec. 300; *Danbury &c. R. Co. v. Wilson*, 22 Conn. 435; *Agricultural Branch R. Co. v. Winchester*, 13 Allen, 29.

⁵ *Rutland &c. R. Co. v. Thrall*, (1862) 35 Vt. 536, 553; *Mills v. Stew-*

Massachusetts and Maine, and in Vermont, no action will lie unless there has been an express promise to pay.¹ This would seem to be the rule in California also.² In jurisdictions where it is held that subscriptions may be specifically enforced, it is unnecessary that the corporation should have formally accepted the subscriptions.³

§ 585. Forfeiture of shares for non-payment.—The power to forfeit and sell the shares owned by stockholders for non-payment of their subscriptions, is not a common-law remedy and can only be exercised when expressly conferred by statute.⁴ Of course, however, a forfeiture of stock may follow non-payment of an assessment, under a statute which explicitly so provides.⁵ And where there has been a simple taking of shares without any express agreement to pay assessments thereon, resort must first be had to the forfeiture of the shares

art, 41 N. Y. 384; *Small v. Herkimer &c. Co.*, 2 N. Y. 330, reversing s. c. 21 Wend. 273; *Ogdensburg &c. R. Co. v. Miller*, 10 Barb. 260, 271; *Northern &c. R. Co. v. Frost*, 21 Barb. 541; *Allen v. Montgomery &c. R. Co.*, 11 Ala. 437; *Macaulay v. Robinson*, 18 La. Ann. 619; *Athol &c. R. Co. v. Inhabitants of Prescott*, (1872) 110 Mass. 213; *Macon &c. R. Co. v. Vason*, 57 Ga. 314; *Kennebec &c. R. Co. v. Kendall*, 31 Me. 470; *Giles v. Hutt*, 3 Ex. 18; *Snell's Case*, L. R. 5 Ch. 22; *Knight's Case*, L. R. 2 Ch. 321; *King's Case*, L. R. 2 Ch. 714.

¹ *Boston &c. R. Co. v. Welling-ton*, (1873) 113 Mass. 79; *Belfast &c. R. Co. v. Cottrell*, (1876) 66 Me. 185; *Belfast &c. R. Co. v. Moore*, 60 Me. 56; *Buckfield &c. R. Co. v. Irish*, 39 Me. 44; *Kennebec &c. R. Co. v. Kendall*, 31 Me. 470; *Connecticut &c. R. Co. v. Bailey*, 24 Vt. 465; s. c. 58 Am. Dec. 181. *Cf.* *New Hampshire &c. R. Co. v. Johnson*, (1855) 30 N. H. 390; *Katowa Land Co. v. Holley*, 129 Mass. 540. *Acc.* *Pittsburgh &c. R. Co. v. Gaz-*

zam, 32 Pa. St. 340, where a statute authorizing suit was declared unconstitutional.

² *West v. Crawford*, (1889) 80 Cal. 19.

³ *Lake Ontario &c. R. Co. v. Ma-son*, 16 N. Y. 451; *Buffalo &c. R. Co. v. Dudley*, 14 N. Y. 336; *North-ern R. Co. v. Miller*, 10 Barb. 260; *Buffalo &c. R. Co. v. Clark*, 22 Hun, 359; *Hughes v. Antietam &c. Co.*, (1870) 34 Md. 316. *Cf.* *Penobscot &c. R. Co. v. Dummer*, 40 Me. 172. *Contra*, *Starrett v. Rock-land &c. R. Co.*, 65 Me. 374.

⁴ *Budd v. Multnomah Street Ry. Co.*, (1887) 15 Oregon, 413; s. c. 3 Am. St. Rep. 169; *Westcote v. Min-nesota Min. Co.*, 23 Mich. 145; *Hill v. Nisbet*, 100 Ind. 341; *Perrin v. Granger*, 30 Vt. 595; *Williams v. Lowe*, 4 Neb. 382; *Dixon v. Evans*, L. R. 5 H. L. 606; *Clark v. Hart*, 6 H. L. Cas. 633; *Campbell's Case*, L. R. 9 Ch. 1; N. Y. Laws of 1890, ch. 564, § 43; Ind. Rev. Stat. 1881, § 3896; 8 Vic. ch. 16, § 29.

⁵ *Hill v. Nisbet*, 100 Ind. 341.

provided by statute.¹ But a corporation without power to declare stock forfeited for non-payment of subscriptions may, after failing to collect the full amount by suit, collect the rest by a sale of the stock, under execution and levy.² In no case can a company obtain the right to forfeit shares for non-payment of calls, by passing a by-law to that effect,³ unless the authority to make such by-laws be given by statute. But a statute providing that a company may make and collect assessments in such manner as shall be prescribed in its by-laws, does not confer authority to make a shareholder personally liable for deficiency after forfeiture.⁴ Nor under a statutory authority to pass by-laws regulating the sale of delinquent stock, can the directors by resolution complied with order a sale of the stock owned by a particular party in arrears thereon.⁵ The company may issue new shares in lieu of those that have been canceled or forfeited.⁶

§ 586. Notice of forfeiture.—Where there is no statute upon the subject, notice of forfeiture must be reasonable in point of time.⁷ But if a statute prescribes notice, it is a condition

¹ *New Hampshire Central R. Co. v. Johnson*, (1855) 30 N. H. 390; s. c. 64 Am. Dec. 300; *Belfast &c. R. Co. v. Cottrell*, 66 Me. 185; *Belfast &c. R. Co. v. Moore*, 60 Me. 561; *Piscataqua Ferry Co. v. Jones*, 39 N. H. 491; *Connecticut &c. R. Co. v. Bailey*, 24 Vt. 465; s. c. 58 Am. Dec. 181; *Rutland &c. R. Co. v. Thrall*, (1862) 35 Vt. 536, 553; *Katama Land Co. v. Jonegan*, 126 Mass. 155; *Mechanics' Foundry Co. v. Hall*, 121 Mass. 272; *Ripley v. Lampson*, 10 Pick. 371.

² *Chase v. East Tennessee &c. R. Co.*, (1880) 5 Lea, 415.

³ *In re Long Island R. Co.*, 19 Wend. 37; s. c. 32 Am. Dec. 429; *Kirk v. Norvill*, 1 Term Rep. 118. Even a temporary forfeiture until payment of assessments or fines, can not be authorized by by-law. *Cartan v. Father Mathew &c. Soc.*, 3 Daly, 20; *Adley v. Reeves*, 2 Maule & S. 53. But a subscriber who has voted

for such a by-law has been held estopped to deny its validity and authority. *Lesseps v. Architects Co.*, 4 La. Ann. 316. Cf. *Perrin v. Granger*, 80 Vt. 595; *Detweiler v. Breckincamp*, 83 Mo. 45; *Knight's Case*, L. R. 2 Ch. 321.

⁴ *Kennebec &c. R. Co. v. Kendall*, (1850) 31 Me. 470.

⁵ *Budd v. Multnomah Street Ry. Co.*, (1887) 15 Oregon, 413; s. c. 3 Am. St. Rep. 169.

⁶ *Currier v. Slate Co.*, 56 N. H. 262; *State v. Smith*, 48 Vt. 266; *Taylor v. Miami &c. Co.*, 6 Ohio, 176; s. c. 5 Ohio, 162; s. c. 22 Am. Dec. 785; 26 & 27 Vic. ch. 118, § 11; *Brice's Ultra Vires*, 192, citing *dictum* in *Marshall v. Glamorgan Iron Co.*, L. R. 7 Eq. 137.

⁷ *Lexington &c. R. Co. v. Staples*, 71 Mass. 520, where three days' notice to a shareholder living out of the State was held insufficient; *Rut-*

precedent to forfeiture and must be strictly followed, while if it be merely directory, substantial compliance is sufficient.¹ Accordingly, where a company's articles require ten days' notice of forfeiture, a notice given on February 27th for Monday, March 9th, that date falling on Friday, was held insufficient both because there were but nine clear days intervening, and because the last date mentioned was an impossible one.² And where the notice to the shareholder claims interest from the date of the call instead of from the time of its payment a subsequent forfeiture is invalid.³ So also the pleadings should show that the statutory requirements with respect to notice have been strictly complied with.⁴ But on the other hand, the method of giving notice has been said to be directory rather than mandatory.⁵ Accordingly a charter requirement of notice by publication does not preclude personal notice.⁶ And a provision for notice by letter sent by mail, is sufficiently complied with by leaving a written notice signed by the treas-

land &c. R. Co. v. Thrall, (1862) 35 Vt. 536, where thirty days' notice was held sufficient.

¹ Lake Ontario &c. R. Co. v. Mason, (1857) 16 N. Y. 451; Knight's Case, L. R. 2 Ch. 321; Birmingham &c. Ry. Co. v. Locke, 1 Q. B. 256; Mississippi &c. R. Co. v. Gaster, 40 Ark. 455; Rutland &c. R. Co. v. Thrall, (1862) 35 Vt. 546; Lexington &c. R. Co. v. Staples, 71 Mass. 520; Lexington &c. R. Co. v. Chandler, 13 Met. 311; Lewey's Island R. Co. v. Bolton, (1860) 48 Me. 451; s. c. 77 Am. Dec. 236; Heaston v. Cincinnati &c. R. Co., 16 Ind. 275; s. c. 70 Am. Dec. 430. Cf. Bangs v. Duckinfield, 18 N. Y. 592; Schenectady &c. R. Co. v. Thatcher, 11 N. Y. 102; Eppes v. Mississippi &c. R. Co., 35 Ala. 33; New Albany &c. R. Co. v. McCormick, 10 Ind. 499. In England under the Companies Clauses Act of 1845, before a declaration of forfeiture, notice must be given the shareholder, by serving the notification at his place of abode or sending

it by mail, if his address be known, or if not known, by publication in the London or Dublin Gazette, and the notice must be given at least twenty-one days before declaration of forfeiture. 8 Vic. ch. 16, § 30.

² Watson v. Eales, 23 Beav. 294.

³ Johnson v. Little's Iron Agency, 5 Ch. Div. 687.

⁴ Sands v. Sanders, (1863) 26 N. Y. 239; Alabama &c. R. Co. v. Rawley, 9 Fla. 508; Mississippi &c. R. Co. v. Gaster, (1859) 20 Ark. 455; Mar v. Jacksonville &c. R. Co., 24 Ill. 593; Spangler v. Indiana &c. R. Co., 21 Ill. 276.

⁵ Mississippi &c. R. Co. v. Gaster, (1859) 20 Ark. 455; Schenectady &c. Co. v. Thatcher, (1854) 11 N. Y. 102; Lexington &c. R. Co. v. Chandler, 13 Met. 311; Knight's Case, L. R. 2 Ch. 321. But see Lewey's Island R. Co. v. Bolton, 48 Me. 452; s. c. 77 Am. Dec. 236.

⁶ Mississippi &c. R. Co. v. Gaster, (1859) 20 Ark. 455.

urer at the house of the shareholder, provided it be received by him as soon as he is entitled to receive it by mail.¹ Although it would seem that notice of the intent to forfeit having been given, no further notice that the shares have been forfeited is required,² notice of impending forfeiture is not equivalent to forfeiture; nor can it be effected *ipso facto* by the failure of the shareholder to pay within the time specified in the notice; there must be a due declaration of forfeiture at a lawful corporate meeting.³

§ 587. **Method of forfeiture.**—The power given to a corporation to forfeit stock must be strictly pursued, and if any restrictions or limitations there provided have been disregarded, the alleged act of forfeiture must be declared invalid.⁴ Thus where authority is given to the directors to order the treasurer to sell the stock, they have no authority to order the sale to be made by a committee of themselves.⁵ And forfeiture declared, but not ratified by a general meeting of the stockholders according to the provision of a statute, is void.⁶ But some cases, especially the earlier ones, would seem to hold that a substantial rather than a strict compliance with the statute is sufficient.⁷ If, however, no formal mode of pro-

¹ *Lexington &c. R. Co. v. Chandler*, (1847) 13 Met. 311. *Cf.* *Birmingham &c. Ry. Co. v. Locke*, 1 Q. B. 256; *Graham v. Van Dieman's Land Co.*, 1 Hurl. & N. 541; *Cockerell v. Van Dieman's Land Co.*, 26 L. J. C. P. 203; *South Straffordshire Ry. Co. v. Burnside*, 5 Ex. 129.

² *In re North Hallensbeagle &c. Co.*, 36 L. J. Ch. 317.

³ *Macon &c. R. Co. v. Vason*, (1876) 57 Ga. 314; *Water Valley Manufacturing Co. v. Seaman*, 53 Miss. 655; *Bigg's Case*, L. R. 1 Eq. 309; *Cockerell v. Van Dieman's Land Co.*, 26 L. R. C. P. 203. *Contra*, *Knight's Case*, L. R. 2 Ch. 321.

⁴ *Germantown &c. Ry. Co. v. Fitter*, 60 Pa. St. 124; s. c. 100 Am. Dec. 546; *In re Long Island R. Co.*, 19 Wend. 37; s. c. 32 Am. Dec. 429; *Eastern &c. Plank Road Co. v.*

Vaughn, 20 Barb. 115; *Lewey's Island R. Co. v. Bolton*, (1860) 48 Me. 451; s. c. 77 Am. Dec. 236; *Downing v. Potts*, 23 N. J. 66; *Portland &c. R. Co. v. Graham*, 11 Met. 1; *York &c. R. Co. v. Ritchie*, 40 Me. 425. *Cf.* *Johnson v. Albany &c. R. Co.*, 40 How. Pr. 193; *Rutland &c. R. Co. v. Thrall*, (1862) 35 Vt. 536; *Clarke v. Hart*, 6 H. L. Cas. 633.

⁵ *York &c. R. Co. v. Ritchie*, (1855) 40 Me. 425.

⁶ *London &c. Ry. Co. v. Fairclough*, 2 Man. & G. 674; *Companies Clauses Act of 1845*, 8 Vic. ch. 16, § 31.

⁷ *Knight's Case*, L. R. 2 Ch. 321; *Catchpole v. Ambergate Ry. Co.*, 1 Ell. & B. 111; *Naylor v. South Devon Ry. Co.*, 1 De Gex & Sm. 32. *Cf.* *Honbeach &c. Co. v. Teague*, 5 Hurl. & N. 151.

cedure be prescribed, the forfeiture must be reasonably and justly conducted.¹ Accordingly it has been held that a general resolution of the directors that all stock on which assessments shall remain unpaid at a certain future date shall be sold, will effect a valid forfeiture;² although it would seem that the resolution must designate the shares forfeited.³ The right of forfeiture must be exercised as the successive defaults of payment occur, or the company will be barred from this remedy.⁴ And if at the time that certain successive assessments were levied, the corporation had no funds, and the assessments were needed for legitimate purposes, sales of delinquent stock made thereunder are not void for the reason that the trustees had previously misappropriated the corporate funds.⁵ It is not, however, essential to a valid forfeiture that the name of the stockholder should be erased from the company's books.⁶ Under the English statute the company may not sell any more of the shares of a defaulter than is necessary for the payment of the amount due from him on calls.⁷

§ 588. The company's claim for deficiency.—The right of a company to sue for a deficiency after it has sold or forfeited the shares of a subscriber has been upheld,⁸ even in the case of a stockholder who was not one of the original subscribers.⁹ Although, generally, if stock is forfeited to the use of the company, and not sold, upon failure to pay an assessment, the right to sue for the amount unpaid is lost.¹⁰ But only after

¹ *Mitchell v. Vermont &c. Co.*, (1876) 67 N. Y. 280; *Rutland &c. Co. v. Thrall*, (1862) 35 Vt. 536.

² *Rutland &c. R. Co. v. Thrall*, (1862) 35 Vt. 536. *Cf. Knight's Case*, 15 L. T. N. S. 546.

³ *Johnson v. Albany &c. R. Co.*, 40 How. Pr. 193.

⁴ *Harlem Canal Co. v. Seixas*, 2 Hall, 504; *Stokes v. Lebanon &c. Turnpike Co.*, 6 Humph. 241; *Delaware Canal Co. v. Sansom*, 1 Binn. 70.

⁵ *Marshall v. Golden Fleece &c. Mining Co.*, 16 Nev. 156.

⁶ *In re Fairstock &c. Co.*, 36 L. J. Ch. 616.

⁷ 8 Vic. ch. 16, § 84.

⁸ *Carson v. Arctic Mining Co.*, (1858) 5 Mich. 288; *Hartford &c. R. Co. v. Kennedy*, 12 Conn. 499; *Danbury &c. R. Co. v. Wilson*, 22 Conn. 436; *Instone v. Frankfort Bridge Co.*, 2 Bibb, 576; *Great Northern Ry. Co. v. Kennedy*, 4 Exch. 417.

⁹ *Merrimac Mining Co. v. Bagley*, (1866) 14 Mich. 501. Where both remedies exist together, the remedy upon the contract of subscription may be brought before the stock is forfeited. *Boston &c. R. Co. v. Wellington*, 113 Mass. 79.

¹⁰ *Carson v. Arctic Mining Co.*, (1858)

actual forfeiture and sale of the shares, and not a mere threat of forfeiture in the call, is an action to enforce payment barred; for as long as the stockholder retains a title to his shares his obligation to pay for them continues.¹ When forfeiture is made an alternative and not a concurrent remedy, this is certainly the result.² The principle to be deduced from the cases, however, is that if the act of incorporation or any public statute declares the subscriber to the stock or owner of the shares shall pay calls made thereupon; or if he agree to do so, whether in the articles of association or other legal instrument, he is personally liable, even though the corporation has power to forfeit his stock for non-payment.³ Where a right of forfeiture is given, the remedies are either cumulative or in the alternative according to the terms of the statute or of the agreement.⁴ But where there is a right of forfeiture given, either by the act of incorporation or by the terms of the subscription, but no promise to pay, neither the subscriber to the stock nor the transferee is personally liable to the corporation for calls.⁵ Having lost his previous payments and his stock, still to hold him liable for the deficiency which the compulsory sale of his stock fails to pay would be injustice, unless the charter or general law made such a rule and the subscriber signed with knowledge of it.⁶ Yet, if the statute or charter expressly gives a right to recover the deficiency after forfeiture, and the sale be advertised, but for want of bidders the stock is not sold, the company may proceed against the subscriber for the whole amount due from him.⁷ But the company may not sell the stock to other parties and then sue the original subscriber for

5 Mich. 295, citing *Small v. Herkimer Manuf. Co.*, (1849) 2 N. Y. 330; *Allen v. Montgomery R. Co.*, 11 Ala. 437.

¹ *Macon &c. R. Co. v. Vason*, (1876) 57 Ga. 314; *Instone v. Frankfort Bridge Co.*, 2 Bibb, 576; s. c. 5 Am. Dec. 638. Cf. *Buffalo &c. R. Co. v. Dudley*, 14 N. Y. 336, 347.

² *Carson v. Arctic Mining Co.*, (1858) 5 Mich. 295, citing *London &c. R. Co. v. Fairclough*, 2 Man. & G. 674; *Edinburgh R. Co. v. Hobelwhite*, 6 M. & W. 715; *Giles v. Hutt*, 3 Exch. 18.

³ *Fort Miller &c. Co. v. Payne*, (1854) 17 Barb. 577.

⁴ *Per Hand, J.*, in *Fort Miller &c. Co. v. Payne*, (1854) 17 Barb. 577, where the cases are classified.

⁵ *Fort Miller &c. Co. v. Payne*, (1854) 17 Barb. 577, *per Hand, J.*

⁶ *Rutland &c. R. Co. v. Thrall*, 35 Vt. 536, 553.

⁷ *Gray v. Turnpike Co.*, (1826) 4 Rand. 578. Cf. *Brockenbrough v. James River &c. Co.*, 1 Patton & H. 94; *Danbury &c. R. Co. v. Wilson*, 22 Conn. 435, 456; *Greyke's Case*,

the difference between the assessment and the sum for which the shares sold, there having been no formal declaration of forfeiture.¹ By the English statute cancellation does not affect the right of the company to compel the holder to pay arrears of calls, interest and expenses due at the time of cancellation, deducting therefrom, however, the value of the shares.²

§ 589. The shareholder's remedies.— A shareholder may come in and tender the amount due on his stock and redeem it, while it remains in the company's hands.³ And equity will relieve against a forfeiture of stock made after a tender of the amount due before the sale was made,⁴ as well as in cases of unauthorized forfeiture generally.⁵ Thus where the directors make a call on the corporate stock, and threaten to forfeit the shares of those who refuse to respond, they will be enjoined from forfeiting such shares as are paid in full.⁶ And forfeiture for non-payment of a call illegally made or for non-payment of an amount part of which was illegally assessed, is invalid.⁷ But where the forfeiture has been made regularly and the power given the corporation strictly pursued, equity will not relieve against it.⁸ Accordingly, where a stockholder fails to pay an assessment lawfully made, and his stock is ad-

L. R. 5 Ch. 63; *Stocken's Case*, L. R. 5 Eq. 6.

¹ *Athol & C. R. Co. v. Prescott*, (1872) 110 Mass. 213.

² 26 & 27 Vic. ch. 118, § 6.

³ *Walker v. Ogden*, (1859) 1 Biss. 287; *Mitchell v. Vermont & C. Co.*, (1876) 67 N. Y. 280, where a check for the amount due being refused, but no objection being made to the tender, it was held a good tender to stay the forfeiture proceedings; *Sweny v. Smith*, L. R. 7 Eq. 324. The English Companies Clauses Act of 1845 provides that on payment of calls and interest and expenses, made before any share that has been forfeited be sold, the share shall revert to the party to whom it belonged before forfeiture, in such manner as if calls had been duly paid. 8 Vic. ch. 16, § 35.

⁴ *Mitchell v. Vermont & C. Co.*, (1876) 67 N. Y. 280.

⁵ *Spackman v. Evans*, L. R. 3 H. L. 171; *Taylor v. Midland Ry. Co.*, 28 Beav. 287; *Sweny v. Smith*, L. R. 7 Eq. 324; *Dixon's Case*, L. R. 5 Ch. 79; *Thompson's Liability of Stockholders*, 226.

⁶ *Moore v. New Jersey & C. Co.*, (1889) 57 N. Y. Super. Ct. Rep. 1; s. c. 5 N. Y. Supl. 192.

⁷ *Lewey's Island R. Co. v. Bolton*, (1860) 48 Me. 451; s. c. 77 Am. Dec. 236; *Stoneham & C. R. Co. v. Gould*, 2 Gray, 277; *Portland & C. R. Co. v. Graham*, 11 Met. 1.

⁸ *Small v. Herkimer Manuf. Co.*, (1849) 2 N. Y. 330, 340; *Germantown & C. Ry. Co. v. Fitler*, (1869) 60 Pa. St. 124; s. c. 100 Am. Dec. 546; *Petersborough R. Co. v. Nashua & C. R. Co.*, 59 N. H. 385; *Wilkins v.*

vertised for sale, the facts that the company refused to show plaintiff its bills and vouchers, as required by statute, and that it was a worthless concern, and desired to get plaintiff's stock for the assessment, constitute no ground for the appointment of a receiver, or for the granting of an injunction to restrain the sale.¹ But as a forfeiture defective in form or irregular is voidable only, both the shareholder and the company may waive the irregularities by acquiescence therein.² Mere acquiescence, however, has been said not to bar the shareholder's right to equitable relief against an invalid forfeiture.³ An action to set aside the forfeiture should be brought in the State of the company's domicile.⁴ The measure of damages for wrongful forfeiture of stock is the market value thereof at the time of conversion.⁵ In no case, however, will the court decree a successful plaintiff an undivided interest in the property of the company corresponding to the amount of his shares unlawfully forfeited.⁶

Thorne, (1883) 60 Md. 253; Marshall Dec. 429; Kennebec &c. R. Co. v. v. Golden Fleece &c. Co., 16 Nev. Kendall, 31 Me. 470.
156; Naylor v. South Devon Ry. Co.,³ Garden Gully &c. Co. v. McLister,
1 De Gex & Sm. 32; Sparks v. Com- L. R. 1 App. Cas. 39, 53.
pany of the Proprietors &c., 13 Ves.⁴ North State &c. Co. v. Field, 40
428; Garden Gully &c. Co. v. Md. 151; Ludlow v. Dutch Rhenish
McLister, L. R. 1 App. Cas. 39. Cf. Ry. Co., 21 Beav. 43.
Ludlow v. Dutch &c. Ry. Co., 21
Beav. 43.⁵ Budd v. Multnomah Street Ry.
Co., (1887) 15 Oregon, 413; s. c. 3

¹ Burnham v. San Francisco &c. Am. St. Rep. 169. Directors who
Co., (1888) 76 Cal. 24. forfeit shares without selling them
² Kelk's Case, (1869) L. R. 9 Eq. 107; are bound to credit the shareholders
Knight's Case, L. R. 2 Ch. 321; with the highest market price with-
King's Case, L. R. 2 Ch. 714, 731; out allowance for the effect upon the
Austin's Case, 24 L. J. N. S. 932; market of offering a large number of
Webster's Case, 32 L. J. Ch. 135; shares for sale. Stubbs v. Lister, 1
Woolaston's Case, 4 De Gex & J. Y. & C. Ch. 81.
437; Pendergast v. Turton, 1 Young
& C. Ch. 98. Cf. *In re Long Island*
R. Co., 19 Wend. 37; s. c. 32 Am.
(1861) 18 Cal. 112.
⁶ Smith v. Maine Boys Tunnel Co.,

CHAPTER XXIX.

ASSESSMENTS AND DUES.

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| <p>§ 590. Assessments upon shareholders.</p> <p>591. Assessments upon members of voluntary associations.</p> <p>592. Extent of the power to assess.</p> | <p>§ 593. In whom the power is vested.</p> <p>594. Notice.</p> <p>595. Penalty for non-payment.</p> <p>596. Waiver of penalty and reinstatement.</p> <p>597. Pleading and practice.</p> |
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§ 590. **Assessments upon shareholders.**—The word assessment, when used in reference to members of companies having capital stock, more properly refers to amounts levied upon shareholders after their subscriptions have been fully paid.¹ The power to levy assessments, using the word in this its proper sense, is wholly statutory;² and will not be lightly inferred from the language of a statute or charter.³ And al-

¹ The correct use of the word is shown by cases holding that while stock issued as "non-assessable," cannot be assessed beyond the full par value, yet that these words do not exempt the holder from the payment of calls until the full face value has been paid. *Price's Appeal*, (1884) 106 Pa. St. 421; *Upton v. Tribilcock*, 91 U. S. 45; *Sagory v. Dubois*, 3 Sandf. Ch. (N. Y.) 466; *Taylor on Corporations*, § 522. As the contracts of a bank are not contracts of the individual stockholders, where an assessment was made upon the shareholders of a national bank to satisfy a contractual liability, a married woman who held stock in the bank could claim no immunity from the assessment on the ground that she had no legal capacity to contract. *Witters v. Sowles*, (1888) 32 Fed. Rep. 767.

² *Santa Cruz &c. R. Co. v. Spreckles*, (1884) 65 Cal. 193; *Beach v.*

Smith, 30 N. Y. 116; *American Silk Works v. Salomon*, 4 Hun, 135; *Spence v. Iowa &c. R. Co.*, 36 Iowa, 407; *Ohio &c. R. Co. v. Cramer*, 23 Ind. 490; *Cincinnati &c. R. Co. v. Clarkson*, 7 Ind. 595. *Cf.* *Great Falls &c. R. Co. v. Copp*, 38 N. H. 124; *Atlantic &c. Co. v. Mason*, 5 R. I. 463; *Marlborough Manuf. Co. v. Smith*, (1818) 2 Conn. 579; *Middletown &c. Turnpike Co. v. Watson*, 1 Rawle, 330.

³ Accordingly under a charter which provided that no assessment should be laid upon any share of a greater amount than one hundred dollars in the whole, it was held that the charter limited the aggregate amount of all the assessments to one hundred dollars. *Great Falls &c. R. Co. v. Copp*, 38 N. H. 124; *Lewey's Island R. Co. v. Bolton*, (1860) 48 Me. 451; s. c. 77 Am. Dec. 236.

though the power may have been conferred by charter or statute, it may be restricted by the by-laws of the company.¹ Under the California Civil Code, members of corporations may be assessed beyond the par value of their shares to pay expenses or debts and to conduct the business of the company.²

§ 591. Assessments upon members of voluntary associations.— A member of a voluntary association is under a legal obligation to pay an assessment duly levied in accordance with the rules of the society during the time of his connection therewith.³ But an assessment upon members of a mutual benefit

¹Price's Appeal, (1884) 106 Pa. St. 421.

²Santa Cruz R. Co. v. Spreckles, 65 Cal. 193. As, for example, to repair an engine and other machinery necessary in conducting the corporation's business. *Younglove v. Steinman*, (1889) 80 Cal. 375. So again, where a mining corporation buys an adjoining property and transfers all the property to a new company, receiving stock in the new corporation therefor, and borrows money from one of its stockholders to pay the expenses thereof, there being no fraud, the company is liable for the money borrowed, and can levy an assessment to pay for it. *Taylor v. North Star Gold Min. Co.*, (1889) 79 Cal. 285.

³New Era Life Assoc. v. Rossiter, (Pa. 1890) 19 Atlan. Rep. 140; *Morrison v. Dorsey*, 48 Md. 461; *Building Assoc. v. Kribs*, 7 Leg. & Ins. Rep. (Pa.) 21; *McDonald v. Ross-Lewin*, (1883) 29 Hun, 87, where it was said that the issuance and acceptance of the certificate of membership furnished a sufficient consideration for his agreement to pay an assessment made during the time he should continue a member of the association. Where a corporation of which defendant was a member, organized for the purpose of raising and protecting live-stock, under a provision

of its charter levied an assessment on his live-stock at its taxable value to meet expenses, which assessment was made *pro rata* on all the members, it was held that, after the expiration of the charter, the officers of the corporation, as trustees, might recover the assessment to pay debts on showing that there were no other assets. *Guadaloupe & S. A. R. Assoc. v. West*, (1888) 70 Tex. 391. In an action by a mutual life insurance company against a member for assessments, where the defendant denies having the policy when called upon to produce it, the entries in the company's books and the application for the policy, after the signature thereto has been verified by the defendant, are competent evidence of membership. Where that evidence is supplemented by proof that, while defendant was insured, deaths occurred among the members, for which he was assessed, and notice thereof was given him, it is proper, in the absence of any contradictory testimony, to instruct the jury to find for the plaintiff. *New Era Life Assoc. v. Rossiter*, (Pa. 1890) 19 Atlan. Rep. 140. *Contra*, *In re Protection Life Ins. Co.*, 9 Biss. 188, and *Ancient Order v. Moore*, (Ky. 1880) 9 Ins. L. J. 572, holding that the obligation to pay an assessment in a mutual benefit insurance society is

society to pay for losses and expenses, part of which accrued before some of them became members, is void as to them unless their contract provides for the payment of all assessments levied after admission.¹ In mutual benefit associations payment of the full amount levied must be made in money and strictly in accordance with the contract.² A borrower from a building and loan society is still bound to pay his membership dues.³

§ 592. **Extent of the power to assess.**—The directors of mutual benefit associations have no arbitrary discretion in the matter of assessments, and they can not be levied unless their necessity legally arises.⁴ For the right to levy assessments or dues upon members is governed by the occasion for them.⁵ And assessments must be made in strict conformity with the authority given in the charter and by-laws.⁶ Thus an assessment to pay losses and expenses, where the charter only authorizes an assessment to pay losses, is invalid.⁷ And where a table of rates of assessment has been published by a society, and is made a part of the contract of insurance, the assessment must be in strict accordance therewith.⁸ An assessment, however, made in good faith and upon correct principles and substantially correct, is binding.⁹ Accordingly, an as-

wholly optional with the members, non-payment merely operating to suspend the right to benefits. So, also, it is said of "whips," which are somewhat in the nature of assessments, being demands by the governing committees of clubs for contributions of a certain amount of money from each of the members, that they can not be enforced by legal proceedings, response thereto being a voluntary matter with the club men. *Daly's Club Law*, (2d ed. 1889) 37.

¹ *Insurance Co. v. Houghton*, 6 Gray, 77; *Roswell v. Equitable Aid Union*, 13 Fed. Rep. 840.

² *Manson v. Grand Lodge*, 30 Minn. 509; *Wiggin v. Knights of Pythias*, 31 Fed. Rep. 122; *Protection Life Ins. Co. v. Foote*, 79 Ill. 361; *Buffum v. Fayette Mut. Ins. Co.*, 3 Allen,

360; *Hoffman v. John Hancock & Co. Ins. Co.*, (1875) 92 U. S. 161.

³ *Everham v. Oriental & Co. Assoc.*, 47 Pa. St. 352.

⁴ *Thomas v. Whallon*, 31 Barb. 178; *Pacific Mutual Ins. Co. v. Guse*, (1872) 49 Mo. 332.

⁵ *Pulford v. Fire Dept.*, 31 Mich. 458; *Hibernia & Co. v. Harrison*, 93 Pa. St. 264; *Rosenberger v. Washington Fire Ins. Co.*, 87 Pa. St. 207.

⁶ *Agnew v. Ancient Order*, 1 Mo. App. 254; *Susquehanna Mutual Fire Ins. Co. v. Gackenbach*, (1887) 115 Pa. St. 492.

⁷ *Bersch v. Sinnissippi Ins. Co.*, 82 Ind. 64.

⁸ *York County Mutual Aid & Co. Soc. v. Myers*, 11 Week. Notes, 541.

⁹ *Marblehead Ins. Co. v. Underwood*, 3 Gray, 210.

assessment by directors is not invalid because of their interest therein as members of the society, nor because one director was absent when it was made;¹ nor because the board of directors might have successfully resisted the claim for which it was made, upon technical grounds.²

§ 593. **In whom the power is vested.**—Where all assessments are to be made by the board of directors, and the chairman must approve all proofs of death, when the secretary submits a notice of death to a meeting of the board it may direct the chairman to examine the proofs when they arrive, and if found correct the secretary to issue notices of assessment thereon.³ But an assessment by a minority of the directors is invalid, although the minority was a committee appointed by the majority to make the assessment.⁴ And a vote to make an assessment, leaving the amount in blank, is invalid.⁵ The receiver of a mutual benefit company, appointed in an action brought by the State to procure its dissolution, may assess the members for unassessed losses and bring separate actions against each member therefor.⁶

§ 594. **Notice.**—A statutory direction to corporations to give notice of calls upon subscriptions does not apply to a building association, which has a regular stated system for the payment of dues at definite periods.⁷ In beneficiary associations, however, where the time and frequency of payments depend upon mortality of members, the giving of notice is a condition precedent to the payment of the assessment.⁸ And notice must be given whether required by the by-laws or not,

¹ *Williams v. German Mutual Fire Ins. Co.*, (1873) 68 Ill. 387.

² *Sands v. Hill*, 42 Barb. 651.

³ *Passenger Conductors' Life Ins. Co. v. Birnbaum*, (1887) 116 Pa. St. 565.

⁴ *Monmouth &c. Ins. Co. v. Lowell*, 59 Me. 504. *Cf. Farmers' Mutual &c. Fire Ins. Co. v. Chase*, (1876) 56 N. H. 341.

⁵ *Mutual Ins. Co. v. Paige*, 1 Hilt. (N. Y.) 430.

⁶ *McDonald v. Ross-Lewin*, (1883) 29 Hun, 87.

⁷ *Morrison v. Dorsey*, 48 Md. 461.

⁸ *Farrie v. Supreme Council*, (1898) 47 Hun, 629; *Hall v. Supreme Lodge*, 24 Fed. Rep. 450; *Agnew v. Ancient Order*, 17 Mo. App. 254; *Castner v. Farmers' Ins. Co.*, (1883) 50 Mich. 273; *Bates v. Detroit Mutual Benefit &c. Assoc.*, 47 Mich. 646; *Gellatly v. Minnesota &c. Soc.*, (1880) 27 Minn. 215; *Covenant Mut. &c. Assoc. v. Spies*, (1895) 114 Ill. 463.

to justify expulsion or forfeiture.¹ So that, although the assessment in a benefit association be properly levied, if no proper notice thereof be given no forfeiture is incurred by failure to pay it.² In the absence of prescribed methods of notice a personal service should be made.³ Notice through the mails must be shown to have been placed in the postoffice properly stamped and directed.⁴ And where that kind of notice is provided the mailing is sufficient.⁵ But where notice by mail is not especially provided for, proof that the notice was received must be made.⁶ Where the notice of assessment directs the payment to be made by draft or postoffice order, compliance with the direction is sufficient and sustains a plea of payment.⁷

§ 595. Penalty for non-payment.—The penalty for non-payment of assessments and dues is usually a fine, or suspension from the benefits of membership, or expulsion.⁸ Reasonable fines for delay in payment may be imposed and will be enforced by a court of equity.⁹ And the bringing of

¹ *Wachtel v. Widows' &c. Soc.*, 84 N. Y. 28; *Fritz v. St. Stephen's Soc.*, 62 How. Pr. 69; *Pulford v. Fire Dep't*, 31 Mich. 458; *People v. Benevolent Soc.*, 24 How. Pr. 216.

² *Frey v. Mutual Ins. Co.*, 43 U. C. Q. B. 102.

³ *Wachtel v. Noah Widows' &c. Soc.*, (1881) 84 N. Y. 28; *Jones v. Sisson*, 6 Gray, 288; *York County Mutual Fire Ins. Co. v. Knight*, (1861) 48 Me. 75; *Williams v. German Mut. Fire Ins. Co.*, (1873) 68 Ill. 387.

⁴ *Haskins v. Kentucky &c. Society*, 8 Ky. L. Rep. 101; *Garretson v. Equitable Mutual &c. Assoc.*, (1888) 74 Iowa, 419.

⁵ *Lothrop v. Greenfield &c. Ins. Co.*, 2 Allen, 82.

⁶ *McCorkle v. Texas Benevolent Assoc.*, (1888) 71 Tex. 149; *Durhaus v. Covey*, 17 Mich. 282; *Castner v. Farmers' Mutual &c. Co.*, (1883) 50 Mich. 273.

⁷ *Protective Life Ins. Co. v. Foote*, 79 Ill. 361; *Warnicke v. Noakes*, 1 Peake, 67; *Hawkins v. Rutt*, 1 Peake,

⁸ *Vide supra*, CHAPTER V. Where the articles of a benefit society provide that "any member who shall refuse or neglect to pay all fines, dues, or contributions quarterly, and who, having been notified by the financial secretary of his indebtedness, shall still neglect or refuse, for sixty days after receiving said notice, to cancel his indebtedness, shall be dropped from the roll of membership," it has no right to drop a delinquent member from the rolls unless he has received notice of his delinquency. Evidence that the delinquent was absent at the time the notice was mailed to his residence, rebuts the presumption of its receipt by him which would ordinarily arise from the mailing of a notice to his place of residence. *People v. Theatrical Mechanical Assoc.*, (1890) 8 N. Y. Supl. 675.

⁹ *Shannon v. Howard &c. Assoc.*, 36 Md. 383; *Ocmulgee &c. Assoc. v.*

a suit by a building association against a member, does not relieve him from continuing his payments upon his stock subject to the penalties resulting therefrom under the rules of the society.¹ In building societies there is a statutory lien on the shares of members for unpaid instalments and charges.² If fines are not effectual to secure prompt payment of the dues upon their stock, building societies may by rule establish a limit beyond which forfeiture of shares may be declared.³ Forfeiture of stock in a building and loan association is necessarily forfeiture of membership, and *vice versa*; and the obligation to continue payment of dues is at an end.⁴ In benefit associations it may be provided that for failure to pay an assessment for a certain time a member's name shall be erased from the rolls and that he shall forfeit all claims upon the society.⁵ Mutual benefit insurance societies may make provision for forfeiture of policies on non-payment of assessments.⁶ But if not provided in the contract of insurance, forfeiture or suspension does not result.⁷ In all cases the causes and methods of forfeiture must be pointed out by by-law and

Thomson, 52 Ga. 427; Parker v. Butcher, 16 L. J. Ch. 552; L. R. 3 Eq. 762; McGannon v. Central Build. Assoc., 19 W. Va. 726, holding that a fine of ten cents for failure to pay twenty-five cents was reasonable. *Contra*, Mulloy v. Fifth Ward &c. Assoc., 2 MacArth. 594.

¹ German &c. Assoc. v. Metzger, 3 W. N. C. (Pa.) 204; Union &c. Assoc. v. Masonic Hall Assoc., 29 N. J. Eq. 389.

² McGrath v. Hamilton &c. Assoc., 44 Pa. St. 383; Watkins v. Workingmen's &c. Assoc., (1881) 97 Pa. St. 514; Hawkeye &c. Assoc. v. Blackburn, 48 Iowa, 385. *Cf.* Union Bank v. Laird, 2 Wheat. 390; Rogers v. Huntington Bank, 13 Serg. & R. 77; Grant v. Mechanics' Bank, 15 Serg. & R. 140; Sewall v. Lancaster Bank, 17 Serg. & R. 285; Utica Bank v. Smalley, 2 Cow. 770; Steamship Dock Co. v. Heron, 52 Pa. St. 280.

³ Card v. Carr, 1 C. B. N. S. 197.

⁴ McCahan v. Columbian &c. Assoc., 40 Md. 226; Masonic Mutual &c. Assoc. v. Beck, (1881) 77 Ind. 203; Joliffe v. Madison Mutual Ins. Co., (1875) 39 Wis. 111; Grand Lodge v. Cohn, 20 Ill. App. 335; Erdman v. Mutual Ins. Co., 44 Wis. 376; Bailey v. Mutual Ben. Assoc., (Iowa, 1886) 27 N. W. Rep. 770.

⁵ Yoe v. Mutual Ben. Assoc., 63 Md. 86; Rood v. Railway Passenger &c. Assoc., (1887) 31 Fed. Rep. 62; American Mut. Aid Soc. v. Quire, 8 Ky. L. J. 101; Southern Mutual &c. Ins. Co., (1881) 79 Ky. 404; Benevolent Soc. v. Baldwin, 86 Ill. 479; Madeira v. Merchants' &c. Soc., 16 Fed. Rep. 749.

⁶ Madeira v. Merchants' &c. Soc., (1883) 16 Fed. Rep. 749.

⁷ District Grand Lodge v. Cohn, 20 Ill. App. 335; Sanford v. California Ins. Assoc., 63 Cal. 547; Mutual Benefit Life Ins. Co. v. French, 30 Ohio St. 240.

strictly followed.¹ It can not be founded upon an omission for which another penalty is prescribed.²

§ 596. Waiver of penalty and reinstatement.—Forfeiture does not take place until declared against a member by the proper officers of the society, and grounds of forfeiture may be waived by them.³ Receiving and retaining assessments is deemed to be a waiver of the right to forfeiture.⁴ Thus a member of a mutual aid society failed to pay his dues during a certain year; but the company, not discovering his failure, demanded and received subsequent dues, and retained them until after the death of the member; and it was held that the company had waived the forfeiture for non-payment, and was liable for the amount of the certificate.⁵ And where a subordinate lodge sent to the grand lodge a member's assessment, who, although he had not paid it, was not suspended for non-payment, as, under a by-law, he might have been, and he died without having paid the assessment, his death-benefit was due from the grand lodge.⁶ Restoration of privileges after default is accorded with slight reference to formalities, all of which may be waived.⁷

§ 597. Pleading and practice.—As making assessments is a ministerial act, and every fact authorizing it must exist and every act required must be performed in order to subject a member to forfeiture of his rights for non-payment,⁸ all such matters must be averred in pleading and proved at the trial.

¹*In re Butchers' &c. Assoc.*, 38 Pa. St. 298, 299; *Commonwealth v. Pennsylvania &c. Inst.*, 2 Serg. & R. 141; *Commonwealth v. German Soc.*, 15 Pa. St. 251; *Diligent Fire Co. v. Commonwealth*, 75 Pa. St. 291.

²*Wachtel v. Noah Widows' &c. Soc.*, (1881) 84 N. Y. 28.

³*Watkins v. Workingmen's &c. Assoc.*, 97 Pa. St. 514; *Rey v. Deyncourt*, 4 Best & S. 820; *North America &c. Assoc. v. Sutton*, 35 Pa. St. 463; *Moore v. Rawlins*, 6 C. B. N. S. 289.

⁴*Underwood v. Iowa Legion of Honor*, 66 Iowa, 134; *Gray v. Na-*

tional Ben. Assoc., 111 Ind. 531; *Tobin v. Western Mut. Aid Soc.*, (1887) 72 Iowa, 261; *Roswell v. Equitable Aid Union*, 13 Fed. Rep. 840.

⁵*Tobin v. Western Mut. Aid Soc.*, (1887) 72 Iowa, 261.

⁶*Scheu v. Grand Lodge*, 17 Fed. Rep. 214.

⁷*Gaige v. Grand Lodge*, 15 N. Y. St. Rep. 455; *Manson v. Grand Lodge*, 30 Minn. 509; *Ingram v. Supreme Council*, (1888) 14 N. Y. St. Rep. 600.

⁸*American Mut. Aid Soc. v. Helburn*, (1887) 85 Ky. 1.

An averment that the assessment was duly made is insufficient.¹ And if an assessment is levied not in accordance with the constitution of a society but with a custom thereof, the custom must be shown to have been within the knowledge of the member.² It is frequently provided, however, that the records of a society shall be *prima facie* evidence of the occurrence of losses and of the legality of the assessment.³

¹ American Mut. Aid Soc. v. Helburn, (1887) 85 Ky. 1; Mutual Ins. Co. v. Houghton, 6 Gray, 77.

² Underwood v. Iowa Legion of Honor, 66 Iowa, 134.

³ People's Ins. Co. v. Allen, 10 Gray, 297; Susquehanna Mut. Fire Ins. Co. v. Gackenbach, (1887) 115

Pa. St. 492; Williams v. German Mut. Fire Ins. Co., (1873) 68 Ill. 387.

CHAPTER XXX.

DIVIDENDS.

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| <p>§ 598. Introductory.</p> <p>599. Ownership of dividends.</p> <p>600. The same subject continued —
Life tenants and remaindermen.</p> <p>601. Declaration of dividends.</p> <p>602. Actions to compel declaration of dividends.</p> <p>603. Payment of dividends.</p> <p>604. Actions to enforce payment.</p> <p>605. Payment of dividends out of capital.</p> | <p>§ 606. Of restraining dividends —
(a) In general.</p> <p>607. (b) At instance of a single shareholder.</p> <p>608. (c) At instance of creditors.</p> <p>609. Remedy for payment out of capital.</p> <p>610. Recovery of dividends illegally declared.</p> <p>611. Interest and the Statute of Limitations.</p> |
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§ 598. **Introductory.**—A dividend to the stockholders of a corporation is a fund which the corporation sets apart from its profits to be divided among its members at a certain percentage upon their holdings of its capital stock.¹ Until the dividend is declared it is only something that may come into existence, and the obligation on the part of the corporation to declare it can not be treated as the dividend itself.² In the absence of special provision to the contrary, a dividend is presumed to be payable in cash and in lawful or current money, and may be denominated a cash dividend.³ Thus a company making a dividend payable, for example, in "New York State currency," can not show that bank bills passing only at a discount were meant by that phrase.⁴ But it has been held that a company so situated that it took in but one kind of currency, to wit, that issued by the Confederate States of America, during the war between them and those remaining in the

¹ Lockhart v. Van Alstyne, (1875) 31 Mich. 76, 79; Stevens v. South Devon Ry. Co., 9 Hare, 312; Henry v. Great Northern Ry. Co., 1 De G. & J. 605; Taft v. Hartford &c. R. Co., 8 R. I. 310.

² Lockhart v. Van Alstyne, (1875) 31 Mich. 78; *In re* London &c. Co., L. R. 5 Eq. Cas. 525.

³ Ehle v. Chittenango Bank, (1862) 24 N. Y. 548; Scott v. Central R. &c. Co., (1868) 52 Barb. 45.

⁴ Ehle v. Chittenango Bank, (1862) 24 N. Y. 548.

federal union, might pay dividends in that currency, unless they were declared in general terms to be payable in "money," in which case the currency of the United States would be presumed to have been intended.¹ Scrip certificates, reciting that the holder is entitled to a certain sum in settlement of dividends upon the stock of the company, or to a certain number of shares of stock, or that the holder may exchange them for bonds or other securities of the company,² may be issued, but only when there have been profits actually earned.³

§ 599. Ownership of dividends.—A dividend declared operates as a specific appropriation of a part of the property of the company to its payment, and the claim of the shareholders as creditors develops into an absolute title to the property so appropriated.⁴ Accordingly, after the declaration of the dividend, the profits are considered as separated from the corporate property and payable on demand to the individual stockholders,⁵ as a debt due absolutely to them.⁶ And

¹ *Scott v. Central R. & B. Co.*, (1868) 52 Barb. 45, 66.

² *Chaffee v. Rutland &c. R. Co.*, (1882) 55 Vt. 110, 112; *Brown v. Lehigh Coal &c. Co.*, (1865) 49 Pa. St. 270; *State v. Baltimore &c. Co.*, (1847) 6 Gill, 363; *Bailey v. Citizens' Gas Light Co.*, 27 N. J. Eq. 196.

³ *Bailey v. Citizens' Gas Light Co.*, (1876) 27 N. J. Eq. 196; *Chaffee v. Rutland &c. R. Co.*, (1882) 55 Vt. 110; *St. John v. Erie R. Co.*, 10 Blackf. 271; s. c. 22 Wall. 136; *Lockhart v. Van Alstyne*, (1875) 31 Mich. 76; *McGregor v. Insurance Co.*, 6 Stew. Eq. 181; *Taft v. Railroad Co.*, 8 R. I. 310; *Corry v. Railroad Co.*, 29 Beav. 263; *Brown v. Lehigh &c. Co.*, 49 Pa. St. 270.

⁴ *Carpenter v. New York &c. Ry. Co.*, 5 Abb. Pr. 277; *Clapp v. Astor*, 2 Edw. Ch. 379; *Beers v. Bridgeport Spring Co.*, 42 Conn. 17; *Keppel v. Petersburg Ry. Co.*, Chase's Dec. 167; *Bright v. Lord*, 51 Ind. 272; *Boardman v. Lake Shore &c. Ry. Co.*, 84

N. Y. 157; *Jermain v. Lake Shore &c. Ry. Co.*, 91 N. Y. 483; *Jones v. Terre Haute &c. R. Co.*, 57 N. Y. 196; *Hyatt v. Allen*, 56 N. Y. 553; *Gordon v. Richmond &c. R. Co.*, 78 Va. 501; *Elkins v. Camden &c. R. Co.*, (1883) 36 N. J. Eq. 233; *Lockhart v. Van Alstyne*, 31 Mich. 76, 78; *Curry v. Woodward*, 44 Ala. 305; *Rand v. Hubbell*, 115 Mass. 461, 474; *Dalton v. Midland Counties Ry. Co.*, 13 C. B. 474; *Goodwin v. Hardy*, 57 Me. 143, 145.

⁵ *King v. Paterson &c. R. Co.*, (1860) 29 N. J. L. 82; s. c. 29 N. J. L. 504; *Kane v. Bloodgood*, 7 Johns. Ch. 90; *State v. Baltimore &c. R. Co.*, 6 Gill, 363; *Hart v. St. Charles Street Ry. Co.*, 30 La. Ann. 758; *Fawcett v. Laurie*, (1860) 1 Drew. & S. 192. Cf. *Carlisle v. Southeastern Ry. Co.*, (1850) 1 Mac. & G. 689; *People v. Merchants' & Mechanics' Bank*, 78 N. Y. 269.

⁶ *Scott v. Central R. &c. Co.*, 52 Barb. 45; *Williston v. Michigan*

if a corporation declares a dividend and deposits the fund divisible in a bank for distribution, and after the dividend has become payable a receiver is appointed, the receiver can not withdraw the portion of the fund not paid out, for the title to it has passed to the shareholders.¹ So also if a stockholder, after receiving due notice of the deposit of money to pay his dividend at a banking house of good credit, neglects to draw his money within a reasonable time, and a loss occurs by a failure of the bank, it will fall upon him.² Again, if an insurance company, having declared a dividend from profits, and carried the fund divisible to the profit and loss account, and prepared checks for the shareholders, is then made insolvent by a great fire, the policy-holders have a right to that fund.³ If, however, the fire and insolvency occur after the dividend is declared, but before it is payable, the shareholders come in only as creditors equally with the policy-holders.⁴ As a dividend once declared passes to the person owning the stock at that time, it is wholly immaterial at what times or from what sources the profits out of which it is declared may have been earned.⁵ And in case of doubt with respect to the person entitled, the company may safely pay it to him in whose name the shares are registered upon the corporate books.⁶ An heir is not entitled to receive payment of dividends until the stock has been transferred into his own name upon the company's books.⁷ And whether a dividend upon

Southern R. Co., 13 Allen, 404; *Jermain v. Lake Shore &c. R. Co.*, (1883) 91 N. Y. 483; *Van Dyck v. McQuade*, 86 N. Y. 38; *Hill v. Newichawanick Co.*, 71 N. Y. 593; s. c. 8 Hun, 459; *Brundage v. Brundage*, (1875) 60 N. Y. 544; s. c. 65 Barb. 397; *Spear v. Hart*, 3 Rob. 420; *In re Le Blanc*, 14 Hun, 8; *Beers v. Bridgeport Spring Co.*, 42 Conn. 17; *Harris v. San Francisco &c. Co.*, 41 Cal. 393.

¹ *In re Le Blanc*, 4 Abb. N. C. 221; s. c. 14 Hun, 8; *Le Roy v. Globe Ins. Co.*, 2 Edw. Ch. 657; *Beers v. Bridgeport Spring Co.*, 42 Conn. 17. Cf. *King v. Paterson Ry. Co.*, 29 N. J. 82, 504; *City of Ohio v. Cleveland Ry. Co.*, 6 Ohio St. 489.

² *King v. Paterson &c. R. Co.*, 29 N. J. 82.

³ *Le Roy v. Globe Ins. Co.*, 2 Edw. Ch. 657.

⁴ *Lowerre v. American &c. Co.*, 6 Paige, 482.

⁵ *Marsh v. Eastern R. Co.*, 43 N. H. 515; *Jones v. Terre Haute &c. R. Co.*, 57 N. Y. 196; *Goodwin v. Hardy*, 57 Me. 143; *Gifford v. Thompson*, 115 Mass. 478; *Jermain v. Lake Shore &c. Ry. Co.*, 91 N. Y. 483.

⁶ *Brisbane v. Delaware &c. R. Co.*, 94 N. Y. 204; s. c. 25 Hun, 438; *Jones v. Terre Haute &c. R. Co.*, 29 Barb. 353; *Cleveland &c. R. Co. v. Robbins*, 35 Ohio St. 483.

⁷ *State v. New Orleans &c. R. Co.*,

stock owned by a married woman is payable to her or to her husband depends upon the law of the company's domicile.¹ One who takes title to stock under a general bequest is not entitled to dividends until the lapse of the time limited for the settlement of the estate,² though a specific bequest of stock vests in the legatee the right to all dividends accruing after the death of the testator.³

§ 600. The same subject continued — Life tenants and remaindermen.—It is now uniformly held, both in England and this country, that ordinary cash dividends declared from the profits or earnings of the corporation do not go to the corpus of the trust in which shares are held, but belong to the *cestui que trust* as income.⁴ In the case of accumulated surplus the American rule is that, when at last the distribution is made, what was earned in his time should go to the tenant for life, and what was accumulated before the commencement

30 La. Ann. 308. Payment should be made to the administrator. *Brisbane v. Delaware &c. R. Co.*, 94 N. Y. 204.

¹ *Graham v. First National Bank*, 84 N. Y. 393; s. c. 20 Hun, 325; *Bank of Louisville v. Gray*, (1887) 84 Ky. 565. Cf. *Dow v. Gould &c. Co.*, 31 Cal. 629.

² *Webster v. Hale*, 8 Ves. 410.

³ *Loring v. Woodward*, 41 N. H. 391. He has no title, however, to dividends declared before the testator's death, although remaining unpaid. *Perry v. Maxwell*, 2 Deq. Eq. 487. A testator owned five thousand five hundred and eighty-two shares of stock in an unincorporated association formed for the purpose of dealing in and developing lands. The association had bought and sold lands during testator's lifetime, and at his death owned six hundred acres. The stock was supposed to have only a nominal value, and was valued in the appraisal at five dollars a share. About two years after his death it became the opinion of experts that

the land owned by the company contained copper, and shortly afterwards forty acres were sold for \$500,000. The association then declared a "dividend out of the profits arising from the sale of the land . . . of \$19.50 a share." Testator's executors received \$108,849. Testator had given to his daughter "all the rents, issues, profits and income of his estate," and after her death had bequeathed his estate to a charity. It was held that the daughter was entitled to the above sum of \$108,849 as income. *Penrose, J.*, dissents. *Oliver's Estate*, (Pa. 1889) 6 Ry. & Corp. L. J. 203.

⁴ *Price v. Anderson*, 15 Sim. 473; *Johnson v. Johnson*, 15 Jur. 714; *Bates v. Mackinley*, 31 Beav. 280; *Wright v. Tucket*, 1 Johns. & Hern. 266; *Cogswell v. Cogswell*, 2 Edw. Ch. 231; *Read v. Head*, (1863) 6 Allen, 174; *Ware v. McCandlish*, 11 Leigh, 595; *Cuming v. Boswell*, 2 Jur. N. S. 1005; *Barclay v. Wainwright*, 14 Ves. 66; *Norris v. Harrison*, 2 Madd. 268; *Preston v. Mel-*

of the life interest should go to the principal fund.¹ This rule is illustrated by a case where a testator left the income of stock which at his death, by reason of an accumulated surplus, had increased in value a certain amount per share, and the surplus some time afterward was converted into new stock, and it was held that the amount of the increased value of the old shares at the testator's death, subtracted from the value of the new stock after issue, left a sum which represented profits since the death of the testator and belonged to the tenant for life.² And in a late case it was decided that one who was entitled to the "net annual income" of corporation stock could rightfully claim all dividends and bonuses distributed among the stockholders, which were divided from and represented the surplus earnings of the corporation, but could not so claim any portion of the capital stock of the corporation which had been purchased by the corporation on credit of its bonds, and distributed among the stockholders, although such stock, when distributed, was charged to the profit and loss account of the corporation.³ In England the distinction is between a regular dividend, which is held without controversy to be income, even when it is increased beyond the usual amount,⁴ and the extra dividends whether in stock or in cash, which are by the great preponderance of English authority still held to be accretions to the capital of the trust fund.⁵ Thus an extra dividend of five per cent. is-

ville, 16 Sim. 163; *Clive v. Clive*, 600; *Murray v. Glaspe*, 17 Jur. 816; *Beach on Wills*, § 211.

¹ *Richardson v. Richardson*, 75 Me. 575; s. c. 4 Am. Prob. Rep. 352; *Vinton's Appeal*, 99 Pa. St. 434; s. c. 3 Am. Prob. Rep. 231; *Biddle's Appeal*, 99 Pa. St. 278; s. c. 3 Am. Prob. Rep. 442; *Clarkson v. Clarkson*, 18 Barb. 646; *Van Doven v. Olden*, 19 N. J. Eq. 176; *Ashurst v. Field*, 26 N. J. Eq. 1; *Earp's Appeal*, (1857) 28 Pa. St. 368; *Moss' Appeal*, 83 Pa. St. 264; *Lord v. Brooks*, 52 N. H. 72; *Wiltbank's Appeal*, 64 Pa. St. 256; *Roberts' Appeal*, 92 Pa. St. 407; *Thompson's Appeal*, 89 Pa. St. 36; *In re Thompson's Estate*, 11

Week. N. Cas. (Pa.) 482; *Hite v. Hite*, (Ky. 1887) 2 Ry. & Corp. L. J. 568; *Wheeler v. Perry*, 18 N. H. 307.

² *Earp's Appeal*, (1857) 28 Pa. St. 368.

³ *Gilkey v. Paine*, (1888) 80 Me. 319. It was said in this case that the equitable and proper division of the shares between an owner of a life interest in the original stock and the remainderman, was to give the stock dividend to the latter, but the income on the stock distributed as a dividend to the life tenant.

⁴ *Barclay v. Wainwright*, 14 Ves. 66; *Witts v. Steere*, 13 Ves. 263.

⁵ *Brander v. Brander*, 4 Ves. 800; *Irving v. Houstoun*, 4 Paton H. of

sued instead of increasing the regular dividend, although earned in the same way and in the same period as the regular dividend, is given to the remainderman.¹ But bonuses when made from profits have been given to the life tenant,² especially where declared from profits of the last half year,³ as a bonus of one per cent. on Bank of England stock made in addition to the regular dividend,⁴ and where a semi-annual dividend was simply two per cent. larger than usual.⁵ In Massachusetts and a few other States, for the guidance of trustees of property invested in corporate shares, a simple rule, to regard cash dividends, however large, as income, and stock dividends, however made, as capital, has been announced.⁶ Under this rule, in deciding whether the distribution is a stock or cash dividend, the actual and substantial character of the transaction must be considered, and not its nominal character merely.⁷ Accordingly a dividend representing profits is to be regarded as income, though permanent improvements to an equal amount had previously been made, and it is just sufficient to pay for a voted increase in the capital stock which the stockholders are at liberty to subscribe for in proportion to the number of their shares; and it is not a mere substitute

L. Cas. 521; *Paris v. Paris*, 10 Ves. 185; *Clayton v. Gresham*, 10 Ves. 288; *Witts v. Steere*, 13 Ves. 363; *Hooper v. Rossiter*, *McClellan*, 527; *Price v. Anderson*, 15 Sim. 473; *In re Barton's Trust*, L. R. 5 Eq. 238.

¹ *Witts v. Steere*, 13 Ves. 363.

² *Murray v. Glasse*, 17 Jur. 816.

³ *Plumbe v. Neild*, 6 Jur. N. S. 529.

⁴ *Preston v. Melville*, 16 Sim. 163.

⁵ *Barclay v. Wainwright*, 14 Ves. 66.

⁶ *Minot v. Paine*, (1868) 99 Mass. 101; *Daland v. Williams*, 101 Mass. 571; *Leland v. Hayden*, 102 Mass. 542; *Rand v. Hubbell*, 115 Mass. 461; *Hemenway v. Hemenway*, 134 Mass. 446; s. c. 3 Am. Prob. Rep. 429, 436, note; *New England Trust Co. v. Eaton*, 140 Mass. 532; s. c. 4 Am. Prob. Rep. 368; *Heard v. Eldridge*, 109 Mass. 258; *Petition of Brown*, 14

R. I. 371; *Busbee v. Freeman*, 11 R. I. 149; *Parker v. Mason*, 8 R. I. 427; *Gibbons v. Mahon*, 4 Mackey, 130; Ga. Code, § 2256; *Miller v. Guerrard*, 67 Ga. 284. In the leading case of *Minot v. Paine*, 99 Mass. 101, the trust fund was invested in shares of two railroads each of which had accumulated from its net earning a large contingent fund, which had to a great extent gone into the construction of the road. By a vote of the corporation in each case new stock had been issued to represent this fund. And the trustee was directed that the true nature of those dividends of stock was capital and that they should be added to the capital of the trust fund.

⁷ *Daland v. Williams*, 101 Mass. 571; *Rand v. Hubbell*, 115 Mass. 461; *Gifford v. Thompson*, 115 Mass. 478.

for a stock dividend when the stockholder is at liberty to sell his right to subscribe for the new stock.¹ The English and Massachusetts decisions agree that the character of the distribution, whether regular or extra or stock or cash, must be determined by a reference to the vote of the corporation or its directors. The court will not go behind this vote and investigate the sources from which the corporation obtained the money or stock which it distributes, for it is held that neither courts nor trustees can investigate such matters with accuracy; and in many cases no investigation can be made.²

§ 601. Declaration of dividends.—The directors of a corporation may increase the corporate assets beyond the nominal amount by retaining and accumulating the profits or earnings, and may apply them to the purchase of property, or to other purposes not beyond the corporate powers.³ They can not be compelled by the stockholders to make dividends of these earnings, or prevented from accumulating them unless the non-declaration of them be in fraud of the shareholders.⁴ In England, however, they must report the condition of

¹ *Davis v. Jackson*, (Mass. 1890), 8 Ry. & Corp. L. J. 246. In this case it was said of a stock dividend, "But where the form of its transaction has not that effect, there is no reason why courts should be astute to bring it about. The remaindermen rely upon the fact that before the dividend was declared debts to an equal amount had been incurred for permanent improvements. But the mere incurring of a debt for capital did not, of itself, amount to an appropriation to capital of all the income on hand. The corporation was still free to choose how it would deal with its gains. When it did choose, it elected to distribute them. If the plaintiff trustees had seen fit to keep the money and to sell their rights, they could have done so, and neither the corporation nor the *cestuis qui trustent* could have complained. Of course the

trustees could not affect the respective rights of the defendants by their determination. If they had kept the dividend it would have been a bold claim on the part of the remaindermen that it was theirs because the corporation was in debt for additions to capital."

² *Minot v. Paine*, 99 Mass. 101; *Irving v. Houston*, 4 Paton H. of L. Cas. 521, 531.

³ *Lord v. Brooks*, 52 N. H. 72; *Pratt v. Pratt*, (1866) 33 Conn. 446; *Brundage v. Brundage*, 60 N. Y. 544; *Bailey v. Railroad Co.*, (1874) 22 Wall. 604; *Chicago &c. R. Co. v. Page*, 1 Biss. 461; *Miller v. Guerrard*, 67 Ga. 284; *Williams v. Western &c. Co.*, 93 N. Y. 163; *Barton's Trust*, L. R. 5 Eq. 238; *Park v. Grant Locomotive Works*, 40 N. J. Eq. 114.

⁴ *Karnes v. Rochester &c. Ry. Co.*, (1867) 4 Abb. Pr. N. S. 107; *March*

affairs to the stockholders and leave it to the latter to determine whether a dividend shall be declared.¹ Dividends of whatever nature can as a general rule only be declared out of a company's net profits.² But a dividend may be declared for a fiscal year subsequent to the time when the net profits divided were earned.³ In Virginia, however, directors who have failed to declare dividends at the time fixed by the charter can not declare one extending over the period of their failure.⁴ And after a consolidation the profits of one company already earned can not be used to pay a dividend upon the stock of the consolidated corporation.⁵ Net profits are to be distinguished from net earnings, which are properly the gross receipts less the operating expenses. Interest on debts is paid out of what thus remains, that is, out of the net earnings. Many other liabilities are paid out of the net earnings, the remainder is the profit of the stockholders to go toward dividends.⁶ That dividends can only be paid out of net profits

v. Eastern Ry. Co., 43 N. H. 515; *Great Western Ry. Co.*, L. R. 3 Ch. 262.

Jackson v. Newark &c. Co., 31 N. J. L. 277; *Ely v. Sprague*, Clark's Ch. 351; *Rex v. Bank of England*, 2

Barn. & Ald. 620; *State v. Baltimore &c. R. Co.*, (1847) 6 Gill, 363; *Coyote Gold &c. Co. v. Ruble*, 8 Oregon, 284.

¹ 8 Vic. ch. 16, § 120.

² "Companies Accounts, — Payment of Dividends out of Capital," 46 L. T. 343; *Main v. Mills*, 6 Biss. 98; *Hughes v. Vermont &c. Co.*, (1878) 72 N. Y. 207, 210; *Carpenter v. New York &c. R. Co.*, 5 Abb. Pr. 277; *Painesville &c. R. Co. v. King*, 17 Ohio St. 534; *Att'y-Gen. v. State Bank*, 1 Dev. & B. Eq. 545, 555; *Elkins v. Camden &c. R. Co.*, (1882) 36 N. J. Eq. 233; *Lockhardt v. Van Alstyne*, 31 Mich. 76; *Pittsburgh &c. R. Co. v. Allegheny*, 63 Pa. St. 126; *Barnes v. Pennell*, 2 H. L. Cas. 497; *In re Mercantile &c. Co.*, L. R. 4 Ch. 475.

³ *Mills v. Northern Ry. &c. Co.*, (1870) L. R. 5 Ch. 621. Cf. *Hooile v. Nichols v. New York &c. R. Co.*, 21

⁴ *Gordon v. Richmond &c. R. Co.*, 78 Va. 501.

⁵ *Chase v. Vanderbilt*, 37 N. Y. Super. Ct. Rep. 334.

⁶ *St. John v. Erie Ry. Co.*, (1872) 10 Blatchf. 271, 279, affirmed in 22 Wall. 136; *Warren v. King*, (1882) 108 U. S. 389, 398; *Van Dyck v. McQuade*, 86 N. Y. 38, 47; *Union Pacific R. Co. v. United States*, (1878) 99 U. S. 402, 422; *De Peyster v. American Fire Ins. Co.*, 6 Paige, 486; *Scott v. Eagle Fire Ins. Co.*, 7 Paige, 198; *Lexington &c. Ins. Co. v. Bage*, 17 B. Mon. 412; s. c. 46 Am. Dec. 528; *Green's Brice's Ultra Vires*, 161; *People v. Supervisors of Niagara*, 43 Hill, 20, 23; *Phillips v. Eastern R. Co.*, 138 Mass. 122; *Hazeltine v. Belfast &c. R. Co.*, (1887) 79 Me. 411; s. c. 1 Am. St. Rep. 330. For further definition and explanation of "net profits" and similar terms, see Beach on Railways, §§ 298, 301; *Nichols v. New York &c. R. Co.*, 21

does not imply that the company is wholly out of debt.¹ But it has been lately laid down that the profits of a corporation, for the purpose of declaring a dividend, consist in the excess of its cash and other property on hand over its liabilities.²

§ 602. **Actions to compel declaration of dividends.**—As a general rule, a stockholder can not sue the corporation for his share of accumulated profits until a dividend has been declared, which is a matter within the discretion of the directors, and which the courts will not control.³ The stockholder has no inchoate or other legal right to the earnings or profits of the company till the dividends have been declared.⁴ It has been strongly stated that the property of every corporation, including all its earnings and profits, belongs primarily to the corporation itself, and not to its stockholders individually or collectively. They have a certain claim it is true, but their claims are always subordinate to the claims of creditors, and the latter approach much nearer to the condition of ownership

Blatchf. 177; *Heard v. Eldridge*, 109 Mass. 258; *Park v. Grant Locomotive Works*, 40 N. J. Eq. 114; *Colt-ners &c. Co. v. Black*, 51 L. J. Q. B. 626; *Bloxam v. Metropolitan Ry. Co.*, L. R. 3 Ch. 337; *Bardwell v. Sheffield &c. Co.*, L. R. 14 Eq. 517; *Hadley's Railroad Transportation*, 58-62; *Mills v. Northern Ry. &c. Co.*, L. R. 5 Ch. 621, 631; *Salisbury v. Metropolitan Ry. Co.*, 18 W. R. 974.

¹ *Belfast &c. R. Co. v. Belfast*, 77 Me. 445; *Barry v. Merchants' Exchange Co.*, 1 Sandf. Ch. 280, 307. *Acc. Mills v. Northern Ry. &c. Co.*, (1870) L. R. 5 Ch. 621; *Hadley's Railroad Transportation*, 58; *Stevens v. South Devon Ry. Co.*, 9 Hare, 313; *Stringer's Case*, L. R. 4 Ch. 475. But see *Hoole v. Great Western Ry. Co.*, L. R. 3 Ch. App. 269; *New York &c. R. Co. v. Schuyler*, 34 N. Y. 49; *Beach on Railways*, § 297.

² *Hubbard v. Weare*, (Iowa, 1890)

44 N. W. Rep. 915, following *Miller v. Bradish*, 69 Iowa, 278.

³ *Beveridge v. New York El. R. Co.*, (1889) 112 N. Y. 1, 27; *Williams v. Western &c. Co.*, 93 N. Y. 162.

⁴ *Browne v. Collins*, L. R. 12 Eq. Cas. 594; *Hyatt v. Allen*, 56 N. Y. 557; *Minot v. Paine*, 99 Mass. 101; *Rand v. Hubbell*, 115 Mass. 474. It is a fundamental rule that dividends can be paid only out of profits or the net increase of the capital of a corporation, and can not be drawn from the capital contributed by the shareholders for the purpose of carrying on the company's business. And a holder of shares in a corporation has no legal claim to profits earned by the company until a dividend has been declared by the proper agents; nor can he compel the declaration of a dividend, except when the profits are withheld in violation of the charter. *Morawetz on Corporations*, §§ 344, 351.

than the former.¹ Until a division, a shareholder has no legal right to the property or profits of the corporation. The individual members of a corporation are no doubt interested, in one sense, in the property of the corporation, as they may derive individual benefit from its increase or loss from its destruction; but in no legal sense are the individual members the owners.² So, too, each share represents an aliquot part of the capital stock; but the holder can not touch a dollar of the principal. He is entitled only to a share in the dividends and profits. Upon the dissolution of the institution, each shareholder is entitled to a proportional share of the residuum after satisfying all liabilities.³ Yet the profits that are divisible among the shareholders as dividends are considered as their own property to the extent that the corporation may not apply them to any purpose not included in the charter without the unanimous consent of the shareholders.⁴ For it is a breach of trust and a fraud upon non-assenting shareholders otherwise to apply profits that should have been divided among them; and at their suit the diversion of the fund may be prevented by injunction, and its proper application enforced.⁵ Therefore while a right to a dividend is no debt until the dividend is declared, the stockholders are not remediless in case the directors, without reasonable cause, refuse to divide the surplus profits. They may be compelled in such cases to make the distribution.⁶ The courts will, however, interfere only in rare and exceptional cases, where the directors are shown to be

¹ *Karnes v. Rochester &c. R. Co.*, 4 Abb. Pr. N. S. 110.

² *Lord Denman, C. J.*, in *Queen v. Arnaud*, 9 Ad. & El. N. R. 806. Where sums chargeable to capital account were paid out of revenue, it was held on the construction of the special acts relating to the company, that shares which the directors had power to issue, but which could only have been sold at a discount, could not be issued at par in lieu of the dividend which might have been paid if the revenue had not been diverted. *Hook v. Great Western Ry. Co.*, L. R. 3 Ch. 262.

³ *Farrington v. Tennessee*, 95 U. S. 687.

⁴ *March v. Eastern R. Co.*, (1862) 43 N. H. 515.

⁵ *March v. Eastern R. Co.*, (1862) 43 N. H. 515; *Brown v. Buffalo &c. R. Co.*, (1882) 27 Hun, 342; *Beers v. Bridgeport Spring Co.*, 42 Conn. 17; *Park v. Grant Locomotive Works*, 40 N. J. Eq. 114; *Browne v. Monmouthshire Ry. &c. Co.*, 4 Eng. L. & Eq. 118; s. c. 13 Beav. 32; *Stevens v. South Devon Ry. Co.*, 9 Hare, 313.

⁶ *Scott v. Eagle Fire Co.*, 7 Paige, 198.

acting in bad faith or wilfully abusing their discretion.¹ Where a company has become insolvent,² or is indebted to an extent that would make it unwise to declare a dividend, the court would unquestionably refuse to interfere.³ In any case, however, one who is not a shareholder in a corporation has no right to a decree compelling the corporation to declare and pay such dividends as may appear upon an accounting to be proper; nor will a court of equity decree an account of liens on the shares of a stockholder at the request of a person having no lien on the shares.⁴

§ 603. Payment of dividends.—Payment of dividends must be provided for without discrimination and at a reasonable time and place, which may be fixed by the directors subsequently to the resolution declaring them.⁵ The place of pay-

¹ *Williston v. Michigan Southern &c. R. Co.*, 13 Allen, 400; *Chaffee v. Rutland R. Co.*, (1883) 55 Vt. 110; *Karnes v. Rochester &c. R. Co.*, 4 Abb. Pr. 417; *Thompson v. Erie R. Co.*, 45 N. Y. 468; *Chase v. Vanderbilt*, (1875) 62 N. Y. 307; *Scott v. Eagle Fire Ins. Co.*, 7 Paige Ch. 198; *Ely v. Sprague*, Clarke Ch. 351; *Howell v. Chicago &c. R. Co.*, 51 Barb. 378; *Barnard v. Vermont &c. R. Co.*, 7 Allen, 512; *Park v. Grant Locomotive Works*, 40 N. J. Eq. 114; *Browne v. Monmouthshire Ry. &c. Co.*, 4 Eng. L. & Eq. 118; s. c. 13 Beav. 32; *Stevens v. South Devon Ry. Co.*, 9 Hare, 313; *Smith v. Prattville Manuf. Co.*, 29 Ala. 503; *State v. Bank of Louisiana*, 6 La. 745; *Beers v. Bridgeport Spring Co.*, 42 Conn. 117; *Pratt v. Pratt*, 33 Conn. 446; *Harris v. San Francisco &c. Co.*, 41 Cal. 393.

² *Scott v. Eagle Fire Ins. Co.*, 7 Paige, 198.

³ *Smith v. Prattville Manuf. Co.*, 29 Ala. 503; *Ryan v. Leavenworth &c. Ry. Co.*, 21 Kan. 365. In *Karnes v. Rochester &c. R. Co.*, 4 Abb. Pr. N. S. 107, the defendant's debt was

funded and not payable for many years. The plaintiff sought to obtain an order that a surplus equal to half of the amount of its indebtedness should be distributed as a dividend. But the court refused, saying: The board of directors in their discretion might do this, but that no court would ever undertake to deal in such a manner with the funds of a corporation which was indebted to an amount at least double the fund sought to be distributed.

⁴ *Berford v. New York Iron Mine*, (1889) 56 N. Y. Super Ct. Rep. 236.

⁵ *March v. Eastern R. Co.*, (1862) 43 N. H. 515; s. c. 40 N. H. 548; s. c. 77 Am. Dec. 732; *Simpson v. Moore*, 30 Barb. 637; *Clarkson v. Clarkson*, 18 Barb. 646; *Spear v. Hart*, 3 Robt. 420; *Le Roy v. Globe Ins. Co.*, (1836) 2 Edw. Ch. 657, where about four-fifths of the dividend having been called for, the rest were not deprived of the benefit of the fund set apart therefor, on account of subsequent bankruptcy; *Foote*, Appellant, 22 Pick. 299; *Balsh v. Hallett*, 10 Gray, 402; *Earp's Appeal*, 28 Pa. St. 363; *Jackson v.*

ment must be appointed at a reasonably convenient distance from the company's place of business or from that of the stockholders,¹ and the time must be within a reasonable time after it is declared.² When the directors undertake to distribute any portion of the funds of the corporation, whether it be called profits or not, all the stockholders are entitled to an equal share in the fund in proportion to their stock.³ Accordingly, there can be no difference made between large and small shareholders;⁴ or between shareholders whose subscriptions are fully paid, and those in arrears.⁵ And no discrimination can be lawfully made between shareholders on account of the date of the issue of their stock if issued before the distribution; and it is immaterial when the property distributed

Newark Plank Road Co., 31 N. J. 277; *King v. Paterson &c. R. Co.*, (1860) 29 N. J. 82, 504, where the place of payment was a banking house in New York City just across the river from one terminus of the road declaring the dividend; *De Gendre v. Kent*, L. R. 4 Eq. Cas. 283; *Price v. Anderson*, 15 Sim. 473; *McLaren v. Stainton*, 3 De Gex, F. & J. 202.

¹ *King v. Paterson &c. R. Co.*, (1860) 29 N. J. 82.

² *Brundage v. Brundage*, 60 N. Y. 544; s. c. 65 Barb. 397; *King v. Paterson &c. R. Co.*, (1860) 29 N. J. 82; *City of Ohio v. Cleveland &c. R. Co.*, (1856) 6 Ohio St. 489. *Cf.* *Burroughs v. North Carolina R. Co.*, 67 N. C. 376.

³ *Jones v. Terre Haute &c. R. Co.*, (1859) 29 Barb. 353; s. c. affirmed 57 N. Y. 196; *Howell v. Chicago &c. R. Co.*, 51 Barb. 378; *State v. Baltimore &c. R. Co.*, (1847) 6 Gill, 363, where the discrimination was in giving the smaller shareholders cash for a part of the dividend that the larger ones had to take in bonds; *Beers v. Bridgeport Spring Co.*, 42 Conn. 17; *Stoddard v. Shetucket Foundry Co.*, 34 Conn. 542; *Ryder v. Alton &c. R. Co.*, 13 Ill. 516; *Coe*

v. Belfast &c. Ry. Co., Irish Rep. 2 C. L. 112; *Harrison v. Mexican Ry. Co.*, L. R. 19 Eq. 358. *Cf.* *Miller v. Illinois Central R. Co.*, 24 Barb. 312. An action in *assumpsit* lies against the corporation on the implied contract that the distribution of dividends shall be equally made. *Jackson v. Newark Plankroad Co.*, (1865) 31 N. J. 277; or for damages, *Cary v. Belfast &c. Ry. Co.*, I. R. 2 C. L. 112. But see *State v. Baltimore &c. R. Co.*, 6 Gill, 363, where it is held that the shareholders can not maintain *assumpsit*, but must proceed by bill in equity. Or a shareholder from whom a dividend has been illegally withheld may resort to the other shareholders to recover his proportion of the money had and received by them. *Peckham v. Van Wagenen*, 83 N. Y. 40. So also a court of equity may restrain a discrimination of this character. *Luling v. Atlantic Mutual Ins. Co.*, 45 Barb. 510. *Cf.* *Harrison v. Mexican Ry. Co.*, L. R. 19 Eq. 358.

⁴ *State v. Baltimore &c. R. Co.*, (1847) 6 Gill, 363.

⁵ *Reese v. Bank*, 31 Pa. St. 78; *Oakbank Oil Co. v. Crun*, L. R. 8 App. C. 65.

was acquired, earned or accumulated.¹ The corporation can not discriminate between the shareholders as to the medium of payment. It can not pay one shareholder in gold and force another to accept his *pro rata* portion in a depreciated paper.²

§ 604. Actions to enforce payment.— When dividends have been declared an action of *assumpsit* may be maintained to enforce payment according to the terms of the resolution declaring them; for after they have been declared, the shareholder's right thereto becomes absolute.³ In some cases, however, it is necessary to proceed by bill in equity.⁴ As when a dividend has been declared, but the time of payment has not been fixed by the directors.⁵ But *mandamus* is not a proper remedy to compel a private corporation to pay dividends which it has declared; still less when any other question es-

¹ *Phelps v. Farmers' &c. Bank*, (1857) 26 Conn. 269; *Luling v. Atlantic &c. Ins. Co.*, 45 Barb. 510; *Jones v. Terre Haute Ry. Co.*, 57 N. Y. 196; *Boardman v. Lake Shore &c. Ry. Co.*, 84 N. Y. 157; *Jermain v. Lake Shore &c. Ry. Co.*, 91 N. Y. 283.

² *State v. Baltimore &c. Ry. Co.*, (1847) 6 Gill, 363; *Keppel v. Petersburg &c. R. Co.*, Chase's Dec. 167.

³ *Kane v. Bloodgood*, 7 Johns. Ch. 90; s. c. 11 Am. Dec. 417; *State v. Baltimore &c. R. Co.*, (1847) 6 Gill, 363; *City of Ohio v. Cleveland &c. R. Co.*, (1856) 6 Ohio St. 489; *Jones v. Terre Haute &c. R. Co.*, 57 N. Y. 196; *Westchester &c. R. Co. v. Jackson*, 77 Pa. St. 321; *Jackson v. Newark Plankroad Co.*, 31 N. J. 277; *Scott v. Central R. &c. Co. of Georgia*, 52 Barb. 45; *Carpenter v. New York &c. R. Co.*, 5 Abb. Pr. 277; *King v. Paterson &c. R. Co.*, (1860) 29 N. J. L. 504; *Festial v. King's College*, 10 Beav. 491; *Davis v. Bank of England*, 2 Bing. 393; *Coles v. Bank of England*, 10 Ad. & E. 437; *Keppel v. Petersburg &c. R. Co.*, Chase's

Dec. 167; *Le Roy v. Globe Ins. Co.*, 2 Edw. Ch. 657; *Dalton v. Midland Counties Ry. Co.*, 13 C. B. 474; *Coey v. Belfast &c. Ry. Co.*, I. R. 2 C. L. 112; *Fawcett v. Laurie*, 1 Drew. & S. 192. The action should as a general rule be instituted against the corporation itself and not against its officers. *Smith v. Poor*, 40 Me. 415; s. c. 3 Ware, 148; s. c. 63 Am. Dec. 672. Where a lease of corporate property provides that the rent shall be paid as dividends directly to the stockholders, the corporation, fully representing their interests, is the proper party to enforce a claim for unpaid dividends. *Pacific R. Co. v. Atlantic &c. R. Co.*, 20 Fed. Rep. 277. No shareholder can sue in behalf of the other stockholders. *Carlisle v. Southeastern Ry. Co.*, 13 Beav. 295.

⁴ *Beers v. Bridgeport Spring Co.*, (1875) 42 Conn. 17; *Le Roy v. Globe Ins. Co.*, 2 Edw. Ch. 657.

⁵ *Scott v. Eagle Fire Ins. Co.*, 7 Paige, 203; *Pratt v. Pratt &c. Co.*, 33 Conn. 446.

ists as to the rights of the person claiming to be entitled to them.¹ It is generally held that, in order to maintain an action therefor, it is essential to show that a demand for the dividend was actually made.² A letter of inquiry, addressed to the president of the company, inquiring generally about dividends for a number of years back, is not a sufficient demand.³ The company may set off unpaid calls against dividends.⁴ But unless it has a lien upon the stock, it may not plead a counter-claim.⁵

§ 605. Payment of dividends out of capital.—The general rule is clear that a company can not pay dividends out of capital; it can only pay them out of profits. To pay dividends out of capital is reducing the capital to the detriment of the creditors of the company. The money is, of course, liable to be spent or lost in carrying on the business of the company; but no part of it can be returned to a member so as to take away from the fund to which the creditors have a right to look as that out of which they are to be paid.⁶ Accordingly

¹ *People v. Central &c. Co.*, (1879) 41 Mich. 166.

² *Scott v. Central R. Co.*, 52 Barb. 45; *State v. Baltimore*, (1847) 6 Gill, 363; *Bank of Louisville v. Gray*, (1887) 84 Ky. 565; *Keppel v. Petersburg R. Co.*, Chase's Dec. 167, 213; *King v. Paterson &c. R. Co.*, (1860) 29 N. J. 504; *Hagar v. Union National Bank*, 63 Me. 509. But in New York it has been held that the institution of suit is in itself a sufficient demand for the payment of dividends due. *Robinson v. National Bank*, 95 N. Y. 637.

³ *Scott v. Central R. &c. Co.*, 52 Barb. 45.

⁴ *King v. Paterson &c. Ry. Co.*, (1860) 29 N. J. 504; *Bates v. New York Insurance Co.*, 3 Johns. Ch. 238; *Sargent v. Franklin Insurance Co.*, 8 Pick. 90; *Hagar v. Union National Bank*, 63 Me. 509; *Citizens' &c. Ins. Co. v. Scott*, 45 Ala. 185; 8 Vic. ch. 16, § 123.

⁵ *March v. Eastern R. Co.*, 43 N. H. 515; s. c. 77 Am. Dec. 732; *Att'y-Gen. v. State Bank*, 1 Dev. & B. Ch. 545; *Hagar v. Union National Bank*, 63 Me. 509.

⁶ *Flitcroft's Case*, (1862) 21 Ch. Div. 519, 533; "Companies' Accounts,—Payment of Dividends out of Capital," 46 L. T. 343; *Carpenter v. New York &c. Ry. Co.*, (1885) 5 Abb. Pr. 277; *Bloxam v. Metropolitan Ry. Co.*, L. R. 3 Ch. 337; *Salisbury v. Metropolitan Ry. Co.*, 38 L. J. Ch. 249; *Macdougall v. Jersey &c. Co.*, 2 Hem. & M. 528; *Holmes v. New-castle &c. Co.*, 45 L. J. Ch. 383; *Queen v. Liverpool &c. Ry. Co.*, 21 L. J. Q. B. 284. In *Trevor v. Whitworth*, 57 L. T. Rep. N. S. 457; s. c. 12 App. Cas. 409, the company affected to purchase its own shares, and the transaction was condemned. Either it was a purchase of shares in the sense of trafficking in shares; which was a purchase not author-

it is illegal for a company to pay interest to shareholders during the construction of its works or the period which elapses before an income is earned out of capital.¹ But this rule does not prevent payment of interest on bonds or debenture stock representing available money raised by borrowing.² When, however, the capital stock of a company has been reduced, the property thus deducted from the capital may be distributed as a dividend.³ And although the property of the company was in its nature of a wasting character, being a deposit of rock to be mined under a lease of the land for that purpose, and had become depreciated both by effluxion of time, and in consequence of the rock dug out, the company was not bound to provide a reserve fund to meet the depreciation, and therefore dividends paid without doing so, were not a payment thereof out of capital.⁴

§ 606. Of restraining dividends — (a) In general.—The payment of a dividend already declared may be enjoined when it appears that there have been no profits earned out of which it could be legally declared; that is, when it would

ized by the memorandum of association, or else it was an extinguishment of the shares, and therefore a reduction of the capital of the company. Either way it was *ultra vires* and illegal. Therefore, if a company's articles of association provide for the payment of dividends out of capital, they are invalid, and the directors will be restrained from acting under them. Even if such payment purported to be authorized by the memorandum of association, it would, in the opinion of Lord Justice Lindley (Company Law, p. 432), be illegal.

¹ "Payment of Interest out of Capital," Editorial article, Law Times, July 19, 1890, reprinted in 8 Ry. & Corp. L. J. 178, citing and discussing *Guinness v. Land Corporation*, 22 Ch. Div. 349; *James v. Eve*, L. R. 6 E. & J. App. 335. *Contra*, *Dent v. London Tramways Co.*, 16 Ch.

Div. 344; *Lambert v. Neuchatel Asphalte Co.*, 30 W. R. 912; s. c. 47 L. T. N. S. 73.

² *Bloxam v. Metropolitan Ry. Co.*, L. R. 3 Ch. App. 337; *Bardwell v. Sheffield Waterworks Co.*, L. R. 14 Eq. 517.

³ *Strong v. Brooklyn &c. R. Co.*, 93 N. Y. 426, 435; *Seely v. New York &c. Bank*, 8 Daly, 400; s. c. 78 N. Y. 608; *Parker v. Mason*, 8 R. I. 427.

⁴ *Lee v. Neuchatel Asphalte Co.*, (Ch. Div. 1889) 6 Ry. & Corp. L. J. 266. *Cf. Davison v. Gillies*, 16 Ch. Div. 347; *Dent v. London Tramways Co.*, 16 Ch. Div. 344; *Lambert v. Neuchatel Asphalte Co.*, 47 L. T. N. S. 73; *Stringer's Case*, L. R. 4 Ch. App. 475; *Coltness Iron Co. v. Black*, L. R. 6 App. Cas. 315, 329; *Rance's Case*, L. R. 6 Ch. App. 104; *In re Oxford Benefit Building Society*, 35 Ch. Div. 502; *Leeds Estate, Build. and Invest. Co. v. Shepherd*, 36 Ch. Div. 787.

have to be paid out of a fund other than net profits,¹ or out of funds necessary to make needed repairs,² or where there has been an overissue of stock, until it can be determined which are the spurious certificates.³ But a dividend can not be restrained on the ground that there is not cash on hand to pay it in full,⁴ nor because the account upon which it was based contained some immaterial errors in calculation;⁵ nor upon the ground that the directors have acted in violation of their duties to the public;⁶ nor, in case of foreign corporations, except in cases of fraud injuriously affecting citizens of the State.⁷

§ 607. (b) *At instance of a single shareholder.*—A bill by a single shareholder to enjoin the declaration of future dividends, which is simply to prevent a violation of law, may be granted on his behalf, and that of all other shareholders, this being a duty common to all and probably a benefit to all.⁸ But a petition by a single shareholder to restrain a dividend already declared, will be refused on the ground that the declaration of the dividend gives the shareholders a legal right to the payment thereof which the court can not interfere with in their absence.⁹

¹ *McDougall v. Jersey &c. Co.*, 2 Hem. & M. 528; *Carpenter v. New York &c. R. Co.*, 5 Abb. Pr. 277; *Underwood v. New York &c. R. Co.*, 17 How. Pr. 537; *Karnes v. Rochester &c. R. Co.*, 4 Abb. Pr. N. S. 107; *Dent v. London Tramway Co.*, 16 Ch. Div. 344; *Carlisle v. Southwestern Ry. Co.*, 13 Beav. 295; *Fawcett v. Laurie*, 1 Drew. & Sim. 192. *Cf. Stevens v. South Devon Ry. Co.*, 9 Hare, 313; *Mills v. Northern Ry. Co.*, L. R. 5 Ch. 621. But see *Ward v. Sittingbourne &c. R. Co.*, L. R. 9 Ch. 488. *Cf. "Stock Dividends and their Restraint,"* by M. Dwight Collier, (1884) 7 Am. Bar Assoc. Rep. 256.

² *Dent v. London Tramway Co.*, (1880) 16 Ch. Div. 344.

³ *Underwood v. New York &c. R. Co.*, 17 How. Pr., 537.

⁴ *Stringer's Case*, L. R. 4 Ch. 475.

⁵ *Yool v. Great Western Ry. Co.*, 20 L. T. N. S. 74.

⁶ *Brown v. Monmouthshire Ry. &c. Co.*, 13 Beav. 32; *Stevens v. South Devon Ry. Co.*, 9 Hare, 313.

⁷ *Howell v. Chicago &c. R. Co.*, 51 Barb. 378.

⁸ *Carlisle v. South Eastern Ry. Co.*, (1850) 1 Macn. & G. 689; *Fawcett v. Laurie* (1860) 1 Drew. & S. 192.

⁹ *Fawcett v. Laurie*, (1860) 1 Drew. & S. 192; *Carlisle v. Southeastern Ry. Co.*, (1850) 1 Macn. & G. 689. *Cf. Davis v. Bank of England*, 1 Macn. & G. 481; *Coles v. Bank of England*, Douglas, 407; *City of Ohio v. Cleveland &c. R. Co.*, 6 Ohio St. 489; *Carpenter v. New York &c. R. Co.*, 5 Abb. Pr. 277; *King v. Paterson &c. R. Co.*, 29 N. J. 82, 504.

§ 608. (c) **At instance of creditors.**—The payment of a dividend may be restrained by the creditors of an insolvent corporation,¹ but not when the insolvency was caused by a great fire after the dividend was declared and the money to pay it appropriated.² Nor can they maintain a bill to restrain it from declaring dividends, in order to keep the assets in a proper state of security for the payment of their debt.³

§ 609. **Remedy for payment out of capital.**—An action may be maintained by a stockholder to enjoin the payment of a dividend where the directors are about to misapply the funds of the corporation in paying the dividend, there being in fact no money earned for the purpose of a dividend.⁴ And if it has been so declared and paid, it may be recovered back of the shareholders who received it.⁵ So also, if dividends have been paid out under the pretense and denomination of surplus profits, when there were no surplus profits to divide, not only may they be taken from the hands of the shareholders who have received them and applied to the payment of debts, but the directors are personally liable therefor,⁶ to the company, its shareholders and creditors;⁷ except where the

¹ *Karnes v. Rochester &c. R. Co.*, 4 Abb. Pr. N. S. 107.

² *Lamar v. American Fire Ins. Co.*, 6 Paige, 482.

³ *Mills v. Northern Ry. &c. Co.*, (1870) L. R. 5 Ch. 621. Nor will a dividend be enjoined at the suit of another company claiming the right of distress for non-payment of toll charges. *South Yorkshire Ry. Co. v. Great Northern Ry. Co.*, 9 Ex. 55.

⁴ *Carpenter v. New York &c. R. Co.*, (1857) 5 Abb. Pr. 277.

⁵ *Russell v. Wakefield Waterworks Co.*, L. R. 20 Eq. 474; *Holmes v. Newcastle &c. Co.*, 1 Ch. Div. 682; *Stringer's Case*, L. R. 4 Ch. App. 475.

⁶ *Gratz v. Rudd*, (1843) 14 B. Mon. 178, 194; *Hill v. Frazier*, (1853) 22 Pa. St. 320; *Fletcroft's Case*, (1882) 21 Ch. Div. 519; *Tarquand v. Marshall*, L. R. 4 Ch. 376; *Evans v.*

Coventry, 8 De Gex, M. & G. 835; *Burnes v. Pennell*, 2 H. L. Cas. 497, 531; *In re Alexander Palace Co.*, 21 Ch. Div. 149; *Salisbury v. Metropolitan Ry. Co.*, 22 L. T. N. S. 839.

⁷ Holding them liable to creditors, are: *In re Exchange Banking Co.*, 21 Ch. Div. 519; *In re County Marine Ins. Co.*, L. R. 6 Ch. 104; *Main v. Mills*, 6 Biss. 98; *Scott v. Eagle Fire Ins. Co.*, 7 Paige, 158. Cf. *Rance's Case*, L. R. 6 Ch. 104. To the corporate creditors only: *Smith v. Huid*, 12 Met. 371; s. c. 46 Am. Dec. 690; *Chamberlin v. Hugenot Manuf. Co.*, 118 Mass. 532; *Priest v. Essex Manuf. Co.*, 115 Mass. 380. Not to creditors, but only to the company and the stockholders: *Lexington &c. R. Co. v. Bridges*, (1847) 7 B. Mon. 556, 559; s. c. 46 Am. Dec. 528. To each shareholder: *Tarquand v. Marshall*, L. R. 4 Ch. 376. Directors, however,

dividend was paid through a mere error in judgment.¹ There are statutes, however, making them liable without reference to whether the dividend infringing the capital stock was declared innocently or fraudulently.² But their statutory liability may be barred by laches, where they have not been guilty of actual fraud.³

§ 610. Recovery of dividends illegally declared.—Where dividends have been declared by the directors and received by the shareholders, they may, nevertheless, be reclaimed by the directors themselves, if they have been illegally declared under a misapprehension of the right to declare them.⁴ And since dividends declared at a time when the corporation was insolvent, or in contemplation of insolvency, are in the nature of a fraud upon creditors, a creditors' bill will lie to reach and subject them to execution,⁵ although the shareholders had received them innocently, having no actual knowledge of the fact that the capital stock was impaired.⁶ But equity will not require stockholders to surrender for the benefit of creditors

who have not been guilty of fraud, and have been compelled to make good to corporate creditors a dividend impairing the capital stock, are entitled to be subrogated to the creditors' rights against the stockholders. *In re Alexander Palace Co.*, 21 Ch. Div. 149; *Salisbury v. Metropolitan Ry. Co.*, 22 L. T. N. S. 839.

¹ *Excelsior & Co. v. Lacey*, (1875) 63 N. Y. 422; *Stringer's Case*, L. R. 4 Ch. 475. *Cf.* *Gillett v. Moody*, 3 N. Y. 479; *Scott v. Central R. & Co.*, 52 Barb. 45; *Keppel v. Petersburg R. Co.*, Chase's Dec. 167; *Reid v. Eatonton Manuf. Co.*, 40 Ga. 98.

² *Companies Act of 1862*, § 165; *Mass. Stat. 1863*, ch. 218, § 3; *Mass. Stat. 1870*, ch. 224, §§ 40, 42; *Rev. of N. J.* p. 178; *Pa. Act of April 7, 1849*, § 9; *Hill v. Frazier*, (1853) 22 Pa. St. 320; *N. Y. 1 Rev. Stat. ch. 18*, tit. 2, art. 1, § 1, subs. 10.

³ *Williams v. Boice*, 38 N. J. Eq. 364; *In re Mammoth Copperopolis*, 50 L. J. Ch. 11.

⁴ *Lexington & Co. v. Page*, 17 B. Mon. 412; s. c. 66 Am. Dec. 165.

⁵ *First National Bank v. Smith*, (1881) 6 Fed. Rep. 215; *Wood v. Dummer*, 3 Mason, 308; *Railroad Co. v. Howard*, 7 Wall. 392; *Curran v. State*, 15 How. 304; *Bartlet v. Drew*, 57 N. Y. 587; *Johnson v. Lafin*, 5 Dill. 65, note; *Hartings v. Drew*, (1879) 76 N. Y. 9; *Osgood v. Laytin*, 48 Barb. 463; s. c. 5 Keyes, 521; *McLean v. Eastman*, 21 Hun, 312; *Bank of St. Marys v. St. John*, 25 Ala. 566; *Gratz v. Redd*, 4 B. Mon. 178; *Heman v. Britton*, (1886) 88 Mo. 549; *Bartholomew v. Bentley*, 15 Ohio, 659; *Rance's Case*, L. R. 6 Ch. 104. *Cf.* *Williams v. Boice*, 38 N. J. Eq. 364; *Pacific R. Co. v. Cutting, Jr.*, 27 Fed. Rep. 638; *Paschall v. Whitsett*, 11 Ala. 472; But see *Spear v. Grant*, 16 Mass. 9, 15; *Vose v. Grant*, 15 Mass. 505.

⁶ *Main v. Mills*, 6 Biss. 98, and note; *Hastings v. Drew*, (1879) 76 N. Y. 9; *Osgood v. Laytin*, 3 Keyes, 521;

of an insolvent corporation dividends declared and distributed at a time when the corporation was solvent.¹

§ 611. **Interest and the Statute of Limitations.**—In New York interest, being in the nature of damages for default of payment, is not dependent upon demand.² But elsewhere interest and the Statute of Limitations do not begin to run until demand and refusal.³ In a recent case in Louisiana it has been held that dividends being payable on demand, until demand and refusal, prescription does not begin to run against the person entitled; and that accordingly, where the stock of an expiring corporation is merged into the stock of a new one organized as its successor, acquiring its franchises and assuming its obligations, a provision inserted in the charter of the new company forfeiting dividends not claimed within three years from the time when declared, is not binding upon the old stockholders, except from the time when, expressly or by implication, they consent thereto by assuming the quality of stockholders in the new company. An old stockholder, who has been ignorant of his rights and of the transfer, and who claims his dividends as soon as informed of their existence, can not be affected by the provision except *in futuro*.⁴

Sagory v. Dubois, 3 Sand. Ch. 466; *Lexington Life &c. Insurance Co. v. Page*, 17 B. Mon. 412; s. c. 66 Am. Dec. 165; *Gratz v. Redd*, 4 B. Mon. 178; *Bank of St. Marys v. St. John*, 25 Ala. 566; *Clapp v. Peterson*, 104 Ill. 26; *National Trust Co. v. Miller*, 33 N. J. Eq. 155. Cf. *Sawyer v. Hoag*, 17 Wall. 610; *Railroad Co. v. Howard*, 7 Wall. 392; *Curran v. State*, 15 How. 304; *Wood v. Dummer*, 3 Mason, 308.

¹ *Reid v. Eatonton Co.*, 40 Ga. 98; *Main v. Mills*, 6 Biss. 98; *In re Mercantile &c. Co.*, L. R. 4 Ch. 475.

² *Adams v. Fort Plain Bank*, 36 N. Y. 255; *Boardman v. Lake Shore &c. R. Co.*, 34 N. Y. 157, 188; *Prouty v. Michigan Southern R. Co.*, 1 Hun, 655, 667.

³ *Philadelphia &c. R. Co. v. Cowell*, 28 Pa. St. 329; s. c. 70 Am. Dec. 128; *Philadelphia &c. R. Co. v. Hickman*, 28 Pa. St. 318; *Keppel v. Petersburg R. Co.*, Chase's Dec. 167, 213; *State v. Baltimore &c. R. Co.*, (1847) 6 Gill, 363.

⁴ *Armant v. New Orleans & C. R. Co.*, (La. 1890) 7 So. Rep. 35.

CHAPTER XXXI.

TRANSFER OF SHARES, AND HEREIN OF TRANSMISSION OF INTEREST IN VOLUNTARY ASSOCIATIONS.

§ 612. Introductory.

- 613. Whether directors may transfer qualification shares.
- 614. Sales by directors and officers.
- 615. Competency of the parties.
- 616. Restrictions upon the power
 - to buy and sell.
- 617. Injunction.
- 618. Performance of the contract.
- 619. Effect of transfer—(a) Upon title to dividends.
- 620. The same subject continued.
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- 622. The same subject continued.

§ 623. Breach of the contract — Remedy.

- 624. Specific performance.
- 625. Avoidance of the contract.
- 626. Remedies for fraud and misrepresentation.
- 627. Transfers otherwise than by contract.
- 628. Transmission of interest in voluntary associations.
- 629. Transfer of shares in cost-book mining companies.
- 630. Transfer of shares in national banks.

§ 612. **Introductory.**—The right to dispose of stock in the same manner as other personal property is inherent in the title, and laws prohibiting this right or interfering with it are generally void.¹ It is now a well-established principle that the shares of the capital stock of corporations are personal property.² And this applies equally to all corporations, including those whose property consists of real estate, although attempts were formerly made to give to the stock of those companies the character of an interest in real estate.³ Sales

¹ *Bank of Attica v. Manufacturers' &c. Bank*, 20 N. Y. 556; *Moore v. Bank of Commerce*, 52 Mo. 377; *Sargent v. Franklin Ins. Co.*, 8 Pick. 90; s. c. 19 Am. Dec. 306; *Fechheimer v. National Exchange Bank*, (1884) 79 Va. 80; *Farmers' &c. Bank v. Wasson*, 48 Iowa, 336.

² *Allen v. Pegram*, 16 Iowa, 163, 173; *Southwestern R. Co. v. Thomson*, 40 Ga. 408; *Dyer v. Osborne*, 11 R. I. 321, 325; *Arnold v. Ruggles*, 1 R. I. 165; *Johns v. Johns*, 1 Ohio St. 350; *Tippets v. Walker*, 4 Mass.

595, 596; "Stock, Its Nature and Transfer," by Henry Budd, Jr., Esq., 7 So. L. Rev. (N. S.) 430. The recent "Stock Corporation Law" of New York enacts that, "The stock of every corporation shall be deemed personal property and shall be represented by a certificate prepared by the directors and signed by the president and treasurer, and sealed with the seal of the corporation." N. Y. Laws of 1890, ch. 564, § 40. Cf. 8 Vic. ch. 16, § 7.

³ *Welles v. Cowles*, 2 Conn. 567;

of stock are, therefore, excluded from the provisions of the Statute of Frauds regulating conveyances of real estate or interests in real estate.¹ In the United States, transfers of stock are generally decided to be within the seventeenth section of the Statute of Frauds, which provides that in sales of "goods, wares and merchandise," there must be some instrument in writing, or part payment or an acceptance of part of the property, in order to make a valid contract binding upon the parties.² In England, however, the contrary rule prevails.³ It must be borne in mind that there is a marked distinction between certificates of stock and shares in the capital of a corporation, a distinction that is not always observed. The certificate does not constitute the title to stock, which is created only by the registry of the holder's name in the corporate books, with a statement of the number of shares of which he is the owner, the certificate being simply an evidence of that ownership;⁴ and without a certificate a duly registered shareholder may exercise the privileges and incur the obligations of a stockholder.⁵ The certificate holder has certain rights, however,

s. c. 4 Conn. 182; s. c. 10 Am. Dec. 115; *Price v. Price*, 6 Dana, 107; *Meason's Estate*, 4 Watts, 341; *Knapp v. Williams*, 4 Ves. Jr. 430; *Tomlinson v. Tomlinson*, 9 Beav. 459.

¹ *Ashworth v. Munn*, 14 Ch. Div. 363; *Walker v. Bartlett*, 18 C. B. 845; *Powell v. Jessopp*, 18 C. B. 336; *Watson v. Spratley*, 10 Ex. 222. Cf. *Baxter v. Brown*, 7 Macn. & G. 193.

² *Mason v. Decker*, 72 N. Y. 595; *Reed on Statute of Frauds*, § 234; *Colvin v. Williams*, 3 Harr. & J. 38; s. c. 5 Am. Dec. 417; *Tisdale v. Harris*, 20 Pick. 9; *Baltzen v. Nicolay*, 53 N. Y. 467; *Sherman v. Tradesman's National Bank*, 16 N. Y. Week. Dig. 522; *Johnson v. Mulry*, 4 Rob. (N. Y.) 401; *North v. Forest*, 15 Conn. 400; *Pray v. Mitchell*, 60 Me. 430; *Fine v. Hornaby*, 2 Mo. App. 61; *Mayer v. Child*, 47 Cal. 142. Cf. *Brownson v. Chapman*, 63 N. Y. 625; *Vanpell v. Woodward*, 2 Sandf. Ch. 143; *Storer v. Flack*, 41 Barb. 162; *Gads-*

den v. Lance, 1 McMull. Eq. 87; *Tomlinson v. Miller*, 7 Abb. Pr. N. S. 364.

³ *Duncuft v. Albrecht*, 12 Sim. 189, 199; *Humble v. Mitchell*, 11 Ad. & E. 205; *Hibblewhite v. McMorine*, 6 Mees. & W. 201, 214; *Heseltine v. Siggers*, 1 Ex. 856; *Tempest v. Kilner*, 3 C. B. 249; *Cheale v. Kenwood*, 3 De Gex & J. 27.

⁴ *Cincinnati & C. R. Co. v. Pearce*, 28 Ind. 502; *Hawley v. Brumagim*, 33 Cal. 394; *Johnson v. Albany & C. R. Co.*, 40 How. Pr. 193.

⁵ *Vide supra*, § 62; *Beckett v. Houston*, 32 Ind. 393; *Mitchell v. Beckman*, 64 Cal. 117; *Agricultural Bank v. Wilson*, 24 Me. 273; *Walker v. Detroit Transit & C. Co.*, 47 Mich. 338; *Buffalo & C. R. Co. v. Dudley*, 14 N. Y. 336; *Ellis v. Proprietors of Essex M. Bridge*, 2 Pick. 243; *National Bank v. Watson*, 105 U. S. 217; *First Nat. Bank v. Gifford*, 47 Iowa, 575.

which can not be barred by laches until they are repudiated by the corporation, as the latter is a trustee for the certificate holder.¹ Under the English Companies Clauses Act of 1845, every transfer of stock must be made by a formal deed of transfer in which all the parties to the transaction are named and the consideration correctly set forth.² Except where it is provided by the by-laws or charter,³ a seal is not necessary to give effect to a contract for the transfer of stock.⁴

§ 613. Whether directors may transfer qualification shares.—Whether a director can transfer his qualification shares is a question still involved in considerable doubt.⁵ Mr.

¹ *Kebogum v. Jackson Iron Co.*, (1889) 76 Mich. 498.

² 8 Vic. ch. 16, § 14; *Browne & Theobald's Ry. Law*, 71, citing *Colonial Bank*, 36 Ch. Div. 36; *Hibblewhite v. McMorine*, 6 Mees. & W. 200; *Societe Generale de Paris v. Walker*, 11 App. Cas. 20; *Regina v. General Cemetery Co.*, 6 El. & B. 415; *Hare v. Waring*, 8 Mees. & W. 362; *Stephens v. De Medina*, 4 Q. B. 422; *Bowlby v. Bell*, 3 C. B. 284, 294; *Shaw v. Rowley*, 16 Mees. & W. 810. *Cf. Cheale v. Kenwood*, 3 De Gex & J. 27. But a vendee can not evade his liability to the corporation when he has himself on his part executed a deed of transfer on the ground that his vendor has executed the deed without nominating the vendee. *Sheffield & c. Ry. Co. v. Woodcock*, 7 Mees. & W. 574; *Straffon's Executor's Case*, 1 De Gex, M. & G. 576; *In re Barned's Banking Co.*, 3 Ch. 105. As to the status of unregistered transferees of preliminary scrip certificates, see *Newry & c. Ry. Co. v. Edmunds*, 2 Ex. 118, where it is held that they are not liable for calls; and *Jackson v. Cocker*, 2 R. C. 368; s. c. 4 Beav. 59, in which it appears that the transferee of these certificates can not in the absence of a special agreement be compelled by

his transferrer to place himself upon the register. *Cf. Rumball v. Metropolitan Bank*, 2 Q. B. Div. 194.

³ *Bishop v. Globe Co.*, 135 Mass. 132.

⁴ *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325; *Quiner v. Marblehead Social Ins. Co.*, 10 Mass. 476; *Atkinson v. Atkinson*, 8 Allen, 15; *Walker v. Bartlett*, 36 Eng. L. & Eq. 369; *In re Tees Bottle Co.*, 33 L. T. N. S. 834; *Commercial Bank v. Kortright*, 22 Wend. 348; *Bridgeport Bank v. New York & c. R. Co.*, 30 Conn. 231, 247; *German & c. Assoc. v. Sendmeyer*, 50 Pa. St. 67.

⁵ In the case of "*In re National Provincial Marine Insurance Company*, better known as *Gilbert's Case*, 33 L. T. Rep. N. S. 34; s. c. 5 Ch. App. 539, Gilbert was a director of the company and the holder of two hundred and forty-five shares of £25 each, on which £3 10s. had been paid. It does not appear, either in this case or another case arising out of the affairs of the same company, (*Ex parte Parker*, 2 Ch. App. 685) what was the number of the qualification shares which a director was required to hold. Gilbert parted with half his shares in order to avoid an impending call, and the transfer and registration were declared void.

Buckley in his work on Companies says: "In the matter of dealing with his shares, a director is in general as free as any other shareholder. He is not a trustee for the general body of shareholders, so as to be unable to deal with his shares in

Lord Romilly, M. R., said that he did not at all mean to dispute the cases which have been decided, that a person who has a certain number of shares in a company which he thinks is turning out ill may get rid of those shares by selling them to anybody whom he can get to take them, provided there is no fraud committed: 'Whether a director can do that is a question which has never yet been determined, and I apprehend that he can not. His situation is that of trustee for the shareholders, and therefore he is not at liberty to do things which he does not think for the benefit of all the shareholders of the company. Still less may he do so to obtain pecuniary advantage to himself.' The case went on appeal to Lord Justice Giffard, and he also declared Gilbert's transfers to be void. In his eyes there was no inherent power in the directors, apart from the provisions of the articles, to refuse to register a proper and valid transfer, if that proper and valid transfer is submitted to them. 'I quite agree that because a man is a director he is not necessarily a trustee of the shares he holds for the general body of shareholders, and in a vast variety of circumstances he is just as free to deal with his shares — except perhaps his qualification, which he can not deal with without giving up his directorship — as any other person.' These judgments were referred to and approved by Mr. Justice Kay in the recent case of *In re South London Fish Market Company*, 59 L. T. Rep. N. S. 210; s. c. 39 Ch. Div. 324; on appeal, 60 L. T. Rep. N. S. 68.

There a company was incorporated by special Act of Parliament, eight persons being the first members. The company was not registered under the Companies Act of 1862, 25 & 26 Vict. ch. 89, and never held an ordinary meeting. A vestry had recovered judgment for an action for penalties against the company for not having completed certain works by a stipulated time. While this action was pending the eight first directors held meetings at which they allotted to themselves their qualifying shares, paid a call thereon, and applied the money in payment to one of them of preliminary expenses which he had paid and was liable to pay. Five of them then transferred their shares to a nominee in consideration of money paid to the transferee. Judgment was given against the company in the action for penalties. No other shares in the company beyond the directors' qualification shares were ever subscribed for. The plaintiffs in the action presented a petition for the winding-up of the company, and Mr. Justice Kay held that the transfers by the directors of their qualification shares, for the purpose of escaping liability, were fraudulent and void, that therefore there were in fact eight members of the company, and that the court had jurisdiction to make a winding-up order. The company appealed, but in vain. The court of appeal held that the special act imposed upon the eight persons incorporated thereby the statutory obligation of continuing directors and members of the company until the first ordinary meeting, and no

a manner prejudicial to the interest of his *cestuis que trust*, but in a vast variety of circumstances is just as free to deal with his shares — except, perhaps, his qualification, which he can not deal with without giving up his directorship — as any

such meeting having been held, that such eight persons still continued members of the company. Consequently the court had jurisdiction to make a winding-up order. It will be seen that the court of appeal decided the question upon grounds different from those taken by Mr. Justice Kay. True, Lord Justice Cotton referred, but only *obiter*, to the point which we have now in view, saying that it might be the proper construction of a section in the company's private act as it was in *Portal v. Emmens*, 35 L. T. Rep. N. S. 882; s. c. 1 C. P. Div. 664, that there was a parliamentary fetter upon the directors, obliging them to continue to hold their shares. But the court of appeal did not make this the basis of their decision, as did Mr. Justice Kay. It should also be noted that the judge treated the whole of the two hundred and forty-five shares in *Gilbert's Case*, 5 Ch. App. 539, as having been the director's qualification shares — a fact which is not so stated in the reports — and considered himself as having in that case the authority of two eminent judges that a director can not deal with his qualification shares as freely as he may with other shares. 'Looking at the doctrine of this court, that a voluntary transfer to escape liability in some cases is a fraud, I cannot doubt,' said the judge, 'that a director voluntarily transferring his qualification shares in order to escape liability is committing a fraud.' These two decisions, it will be observed, leave untouched the question whether a director can validly trans-

fer his qualification shares when he does so without any design of escaping liability. Is the transfer which he executes, purporting to vest his qualification shares in a transferee, valid? Under § 22 of the Companies Act of 1862, 25 & 26 Vict. ch. 89, the right to transfer his shares is incident to every shareholder; and therefore a director shareholder has as much right as any ordinary shareholder to transfer his shares and to have his transfer registered, unless he falls within a provision in the company's articles of association enabling the directors to refuse registration where the shareholder seeking to transfer is 'indebted to the company in respect of calls or otherwise.' The point as to qualification shares was not raised in the recent case of *In re Cawley & Co.*, 61 L. T. Rep. N. S. 601; s. c. 42 Ch. Div. 409, in which the court of appeal threw a great deal of much needed light upon the legal requisites for a valid call, upon the discretion of directors to take their business *agenda* in any order they may think proper, and upon the limited discretion of directors to refuse registration. It is somewhat curious that the point was not touched in *In re Cawley & Co.*, for the case went very near it. And the very recent cases of *Bainbridge v. Smith*, 60 L. T. Rep. N. S. 879; s. c. 41 Ch. Div. 462, and *In re Bainbridge*; *Reeves v. Bainbridge*, *Weekly Notes* 1889, p. 228, have gone near the point, but have not trenched upon it except by laying down, as Mr. Justice North did in the latter case, that the mortgagor of shares holds them in his own

other person," implying that the point has never been directly decided. Granting that the director who transfers his qualification shares gives up his seat on the board; can not he make a perfectly valid transfer of his shares? As between him and the company he is no longer under the slightest obligation to retain the shares. Parting with his directorate, the shares no longer qualify him for anything, for no qualification is needed by him. He can surely transfer them as fully and as freely as can any shareholder in the company.¹

§ 614. Sales by directors and officers.—A stockholder has no right of action against a director growing out of any supposed trust relation existing between them respecting the purchase and sale of stock, for the contract of transfer involves none of the peculiar obligations and privileges of trustee and *cestui que trust* between such parties. So a director in selling stock to a stockholder is not bound to disclose facts bearing upon the value of the stock which are peculiarly within his knowledge by reason of his relation to the company.² And the same is the rule as to sales by any official whose position affords him opportunity to obtain information enabling him to buy and sell at a profit.³

§ 615. Competency of the parties.—Questions regarding the competency of parties to buy and sell shares of stock are to be determined in accordance with the general rules applicable to other ordinary contracts,⁴ and do not ordinarily in-

right for the purpose of a director's qualification. It is clear law now that a director does not lose his qualification by mortgaging his qualification shares; and he may be qualified by shares to which he is entitled as trustee, and not in his own right, and even by shares of which he is trustee for the company." The Law Times, of June 28, 1890; same art. 8 Ry. & Corp. L. J. 99.

¹ The Law Times, of June 28, 1890; same art. 8 Ry. & Corp. L. J. 99, citing Buckley on Companies, (5th ed. 1887) 25.

² Johnson v. Laffin, 5 Dill. 65, 83; Grant v. Attrill, 11 Fed. Rep. 469; Carpenter v. Danforth, 52 Barb. 581; Board of Commissioners v. Reynolds, 44 Ind. 509; Heman v. Britton, 84 Mo. 657; Gilbert's Case, L. R. 5 Ch. 559; Camins v. Coe, 117 Mass. 45; Hempling v. Burr, (1886) 59 Mich. 294; Johnson v. Kirby, 65 Cal. 482.

³ Board of Commissioners v. Reynolds, 44 Ind. 509.

⁴ As to sales of stock by insane persons, see Chew v. Bank of Baltimore, 14 Md. 299.

volve any principle peculiar to the law of corporations.¹ Thus the ability or disability of a married woman to take, hold and transfer shares does not depend upon the charter of the company nor upon statutes relating generally to corporations, but upon the law of married women; so that a *feme covert* domiciled in one State may have power to buy and sell the shares of a corporation, while one having her domicile in another State may be incompetent to deal in the stock of the same company.² So again, according to the general rule governing contracts of minors, a purchase of stock by an infant is not absolutely void, but merely voidable before or within a reasonable time after his becoming of age.³

§ 616. Restrictions upon the power to buy and sell.—There are apparently some qualifications of the general rule above stated, which, however, grow not so much out of the incompetency of the parties as out of express charter or statutory provision and out of principles of public policy. Thus the articles of association of a joint-stock company, which partakes rather of the nature of a partnership than of a corporation, may prohibit the transfer of shares.⁴ And where the holders of each block of five shares in the stock of a theater corporation were entitled by its charter to a free seat,

¹ As to sales of stock by joint-owners, see *Standing v. Bowring*, 27 Ch. Div. 341; *Slaymaker v. Bank of Gettysburg*, 10 Pa. St. 373; *Comstock v. Buchanan*, 57 Barb. 127; *Garrick v. Taylor*, 3 L. T. N. S. 460; *Hill's Case*, L. R. 20 Eq. 585. And by partners, see *Quiver v. Marblehead Social Ins. Co.*, 10 Mass. 476; *Sargent v. Franklin Ins. Co.*, 8 Pick. 90; s. c. 19 Am. Dec. 306. Cf. *Comstock v. Buchanan*, 57 Barb. 127; *Weikersheim's Case*, L. R. 8 Ch. 831.

² *Hill v. Pine River Bank*, 45 N. H. 300. In England this is regulated by the "Married Woman's Property Act" of 1870, 33 & 34 Vic. ch. 93, § 4. But in that country a married woman can not transfer her stock unless it has been formally set apart

as her separate estate. *Howard v. Bank of England*, L. R. 19 Eq. 295. If, however, she has done so and registration has been permitted, it can not be cancelled thereafter. *Ward v. Southeastern Ry. Co.*, 2 Ellis & El. 812. As to the husband's right to transfer shares standing in his wife's name, see cases cited *supra*, p. 841.

³ *Dublin &c. Ry. Co. v. Black*, 8 Ex. 181; *Newry &c. Ry. Co. v. Coombe*, 3 Ex. 655; *Lumsden's Case*, L. R. 4 Ch. 31; *Birkenhead &c. Ry. Co. v. Pilcher*, 5 Ex. 24.

⁴ And in that case the transferee takes only the right to profits, not as a partner, but as an assignee. *Harper v. Raymond*, (1858) 3 Bosw. 29.

it has been held that the owner of more than five shares could not by a transfer valid in form, but fictitious in fact, confer on the transferee the right to another seat, and that a transfer for that purpose could be enjoined at the instance of other shareholders.¹ But ordinarily the corporation can not refuse to register a transfer on account of objection to the intention of the transferrer in making it.² There is no equity, for example, to prevent the transfer of shares to a nominee, to increase voting power.³ And where one of the articles of incorporation limited each stockholder to an ownership of one hundred shares, it was held that, as this was not required by the laws of the State, it was a mere voluntary proposal, and that a transfer of more than that number of shares to one shareholder was valid.⁴ But members of corporations have no such absolute right to transfer their shares as entitles shareholders of a railway company to sell their stock to another railroad company, in defiance of an injunction granted to prevent the other railroad from obtaining control thereof, contrary to the provisions of a State constitution forbidding the control of one railway by another, parallel and competing.⁵ The power of corporations to buy the shares of other com-

¹ *Baker's Appeal*, 108 Pa. St. 510; *s. c.* 56 Am. Rep. 231.

² *Townsend v. McIver*, 2 S. C. 25; *Moffatt v. Farquhar*, 7 Ch. Div. 591; *Barnes v. Brown*, 80 N. Y. 527. In this case the president of a company, who owned a majority of its shares, contracted to sell them and to resign his office for the purpose of enabling his purchasers to acquire control of the corporate affairs; and it was said by the court that, inasmuch as those who have the largest interests in corporations may control them, it was unable to see that any policy of the law was thereby violated, or that upon the evidence any wrong was thereby done to any one. *Contra*, *Fremont v. Stone*, 42 Barb. 169. *Cf.* *Seymour v. Detroit Copper &c. Mills*, 56 Mich. 117. In *Regina v. Liverpool &c. Ry. Co.*, 21 L. J. Q. B. 284, it was held that, the undertaking hav-

ing been virtually abandoned, and a portion of the subscriptions having been returned to shareholders, a purchaser with notice of these facts, whose good faith in becoming a shareholder was questionable, was not entitled to registration.

³ *Moffatt v. Farquhar*, 7 Ch. Div. 591; *Pender v. Lushington*, 6 Ch. Div. 70. As to purchase of shares for the purpose of controlling the corporation, see *Havermeyer v. Havermeyer*, 86 N. Y. 618; *Barnes v. Brown*, 80 N. Y. 527; *Jacobs v. Miller*, 15 Alb. L. J. 188; *Fremont v. Stone*, 42 Barb. 169; *O'Brien v. Breitenbach*, 1 Hilt. 304.

⁴ *O'Brien v. Cummings*, 13 Mo. App. 197.

⁵ *Pennsylvania R. Co. v. Commonwealth*, (1887) 116 Pa. St. 65. *Cf.* Pa. Const. art. xvii, § 4.

panies depends upon the principles heretofore treated in connection with subscriptions to stock by artificial persons.¹ Whether under the circumstances of a case a company had or did not have power to buy the stock of another, a shareholder in the latter can not, after having been guilty of laches, raise the question and object to the transaction as beyond the powers of the former.² A solvent corporation, in the absence of legislative provision to the contrary, may purchase, hold and resell its own shares, and take or give them in pledge or mortgage, provided these transactions be in entire good faith, the exchanges being of equal value, free from all fraud, actual or constructive.³

§ 617. **Injunction.**— Whatever, it is said, be the validity of stock certificates of a corporation, and whether or not they confer on the holders the privileges of corporate shareholders, if they represent an interest in the property for which they were taken, they can not be placed *hors de commerce* by injunction.⁴ Yet there are cases in which injunctions have been granted to restrain transfers of stock, as, for example, where a pledgee was about to sell shares of stock in fraud against his pledgor.⁵ And where the purpose of a fictitious

¹ *Supra*, § 522.

² *Alexander v. Searcy*, (1889) 81 Ga. 536; s. c. 12 Am. St. Rep. 337, holding that where notice of purchases of stock of a corporation is given to the directors and stockholders, and the purchaser regularly votes the stock, and expends large sums for the benefit of the corporation under resolution of the stockholders, the minority stockholders cannot complain, seven to fifteen years after the several purchases were made, that the purchaser, being the majority stockholder, has procured the mismanagement of the corporation, nor that, being a corporation, it had no power under its charter to make the purchases.

³ *First National Bank of Salem v. Salem Capital Flour Mills Co.*, (1889) 39 Fed. Rep. 89; s. c. 6 Ry. & Corp.

L. J. 209, 212; *Bank v. Bruce*, 17 N. Y. 510; *Taylor v. Exporting Co.*, 6 Ohio, 176; *In re Insurance Co.*, 3 Biss. 542; *Bank v. Transportation Co.*, 18 Vt. 138; *Clapp v. Petersón*, 104 Ill. 26; *Dupee v. Water Power Co.*, 114 Mass. 37.

⁴ *State v. American Cotton Oil Trust*, (1888) 40 La. Ann. 8.

⁵ *Ayre v. Seymour*, (1889) 5 N. Y. Supl. 650. In this case it was sought to enjoin defendant from selling or voting on certain shares of stock pledged by plaintiff, the president of the corporation, to defendant S. It appeared that the stock of the corporation, while very valuable, had no market value, as it had not been sold in the market. Including the stock pledged to S., four hundred and ninety-eight shares, plaintiff owned nine hundred and sixty-eight

transfer was to entitle the transferee to a free seat in a theatre, injunction was issued.¹ Again under certain circumstances an injunction has issued to restrain one corporation from obtaining control over another by purchasing the stock of the latter.²

§ 618. Performance of the contract.—When a contract has been made for the sale of stock by which the title is to be passed from one person to another, the question of what is a sufficient transfer is an important one. The performance of the contract on the part of the vendor must be such as to vest the title to the stock in the vendee. Thus when the vendor tenders the certificates, indorsed with a proper assignment and with a power of attorney duly executed, authorizing the assignee to have the transfer recorded upon the corporate books, he has sufficiently performed upon his part.³ Where such a tender is made, the vendee can not evade performance on his part and refuse to accept the stock, in the absence of fraud on the part of his vendor, simply because stock has been issued by the corporation at a price below par or its property has been mortgaged;⁴ nor because the company's title to its property turns out to be worthless;⁵ nor because the winding up of the corporation made it impossible to reg-

shares out of a total of one thousand. S. had transferred the four hundred and ninety-eight shares to his son's wife, who was plaintiff's daughter, and by this means plaintiff was excluded from the management of the business. There was proof that S. and his son, who had control of the business, and who were parties defendant, had conspired to keep plaintiff out of the country, and away from her business, by sending her false telegrams, and suppressing genuine telegrams to her, by reporting that she was insane, and by abstracting papers, etc. The injunction was granted and a receiver *pendente lite* appointed; and the son's wife, who held the four hundred and ninety-eight shares of stock

in her own name, was included in the injunction, though she was not served with summons and complaint, nor with the injunction and motion papers.

¹ *Vide supra*, § 616, note.

² *Pennsylvania R. Co. v. Commonwealth*, (1887) 116 Pa. St. 65.

³ *Munn v. Barnum*, 24 Barb. 283; *Noyes v. Spaulding*, 37 Vt. 420; *Eastman v. Fiske*, 9 N. H. 182; *Merchants' National Bank v. Richards*, 6 Mo. App. 454; *Bruce v. Smith*, 44 Ind. 1. *Cf. Moore v. Hudson River R. Co.*, 12 Barb. 156.

⁴ *Noyes v. Spaulding*, 27 Vt. 420; *Faulkner v. Hebard*, 26 Vt. 452.

⁵ *State v. North Louisiana R. Co.*, 34 La. Ann. 947.

ister the transfer;¹ nor because the vendor sought to escape payment of calls by transferring his stock;² nor because the shares were sold at a speculative price.³ Neither in the absence of fraud does the fact that the corporation was insolvent at the time the contract was made constitute a defense.⁴ In an action for damages for a breach of a contract to take stock where the defendant agreed to secure to plaintiff a bid of a certain amount for the stock within a year, and, failing so to do, to take the stock from him at his option at the end of the year for a named sum, and on the evening of the last day, plaintiff notified defendant that he was expected to take the stock, and for four or five days afterwards his agent called on defendant and tendered him the stock, who refused to take it, but not on the ground that the tender was too late, the defense of a failure to make a tender was not available.⁵ It has been held that the vendee may demand that the vendor shall himself cause the registration of the transfer to be made.⁶ A contract to exchange goods for corporate stock without naming its value calls for the stock at its par value.⁷

§ 619. Effect of transfer — (a) Upon title to dividends.— A transfer of stock does not carry dividends already declared thereon.⁸ For when a dividend is once declared, it belongs to the owners of the stock at the time and is no longer an incident of the shares.⁹ Accordingly the owner of the stock at the time that a dividend is declared is entitled thereto though it is made payable at a date subsequent to the transfer of shares.¹⁰

¹ *Crubb v. Miller*, 19 Week. Rep. Bosw. 29. They may, however, be the subject of contract between the parties, and a lawful agreement in reference to them will be enforced.

² *Grant v. Attrill*, 11 Fed. Rep. 469.

³ *Moffat v. Winslow*, 7 Paige Ch. 124; *Board of Commissioners v. Reynolds*, 44 Ind. 509; *Allen v. Pegram*, 16 Iowa, 163.

⁴ *Rudge v. Bowman*, L. R. 3 Q. B. 689; *Crubb v. Miller*, 19 Week. Rep. 519.

⁵ *Duchemin v. Kendall*, (1889) 149 Mass. 171.

⁶ *White v. Salisbury*, 33 Mo. 150.

⁷ *Tilkey v. Augusta, G. & S. R. Co.*, (Ga. 1890) 10 S. E. Rep. 448.

⁸ *Harper v. Raymond*, (1858) 3

Bosw. 29. They may, however, be the subject of contract between the parties, and a lawful agreement in reference to them will be enforced.

⁹ *Hill v. Newichawanick Co.*, (1876) 71 N. Y. 593, affirming 8 Hun, 459; *Boardman v. Lake Shore & C. Ry. Co.*, (1881) 84 N. Y. 157, 178.

¹⁰ *City of Ohio v. Cleveland & C. R. Co.*, 6 Ohio St. 489; *Boardman v. Lake Shore & C. R. Co.*, 84 N. Y. 157, 178; *Wheeler v. Northwestern Sleigh Co.*, (1889) 39 Fed. Rep. 347; *Hill v. Newichawanick Co.*, (1877) 71 N. Y. 593, affirming s. c. 45 How. Pr. 427,

And where a contract of sale of shares is entered into, under conditions of sale by which the purchase may be completed on a future fixed day, or at any time prior thereto, and dividends are in the meantime declared, the dividends, upon the consummation of the sale, pass to the vendee of the stock.¹ So also where a transfer of shares is made with an agreement, as a condition subsequent, to transfer within a certain time at the option of one of the parties, it is generally held that if the condition is fulfilled or the option exercised, the transfer dates from the day the conditional sale was made, and the title to dividends thereafter declared and payable is in the buyer.² But where an option was sold to take shares before a certain day, afterwards extended to another day, and a dividend was declared between the last two dates, payable after the last one, the dividend was held not to pass to the buyer, as the ownership of the buyer did not begin until the consummation of the transfer.³ It seems, however, that in any case, by special agreement, the vendee may have the dividend or it may be reserved to the vendor.⁴ In a suit between the seller and buyer of stock where the ownership of the dividends is in question, the courts will not undertake to apportion them according to the time when they were earned, whether before or

and 8 Hun, 459; *Spear v. Hart*, 3 Robertson, 420; *Bright v. Lord*, 51 Ind. 272; *De Gendre v. Kent*, L. R. 4 Eq. 283; *Wright v. Tuckett*, 1 Johns. & H. 266. *Contra*, *Black v. Homersham*, 4 Ex. Div. 24; *Clive v. Clive*, Kay, 600; *Burroughs v. North Carolina R. Co.*, 67 N. C. 376. *Cf.* *Curry v. Woodward*, 44 Ala. 305. In *Burroughs v. North Carolina Ry. Co.*, (1872) 67 N. C. 376, shares sold after a dividend was declared but before it was payable, were held to carry the dividend to the purchaser; for it is only when it becomes payable that the dividend becomes "fruit fallen" and detached from the principal estate so as not to pass with it.

¹*Black v. Homersham*, 39 L. T. N. S. 671. If the dividend so de-

clared has been paid to the vendor the vendee can recover it from him. *Harris v. Stephens*, (1835) 7 N. H. 454.

²*Harris v. Stephens*, (1835) 7 N. H. 454; *Currie v. White*, (1871) 45 N. Y. 822; *Black v. Homersham*, (1878) 4 Ex. Div. 24. In the first case cited one offered to another shares if the buyer gave security by a certain date, which he did, and a dividend declared in the meantime belonged to him.

³*Bright v. Lord*, (1875) 51 Ind. 272. *Cf.* *Central R. &c. Co. of Georgia v. Papot*, 59 Ga. 342; *Southwestern R. Co. v. Papot*, 67 Ga. 675.

⁴*Wheeler v. Northwestern Sleigh Co.*, (1889) 39 Fed. Rep. 347; *Hyatt v. Allen*, 56 N. Y. 553; *Brewster v. Lathrop*, 15 Cal. 21.

after the transfer.¹ Accordingly a dividend declared for a period during part of which one was entitled to the dividends declared, and during the other portion another, does not come under a statutory provision apportioning all rents, dividends and other periodical payments in the nature of income, as interest is apportioned according to the lapse of time.² And it has even been held that there can be no apportionment between vendor and vendee, of a dividend declared, but payable at stated intervals,³ for the profits of the enterprise, until set apart by the declaration of a dividend, remain a part of the stock itself, and will pass under a transfer of the shares.⁴ And for the same reason that there can be no apportionment of dividends, dividends that have not been declared can not be assigned separately from the stock itself even in the case of guarantied or preferred dividends.⁵ When, however, a dividend has been declared it is distinct and separable from the fund out of which it is declared, and may be the subject of as-

¹ Kane v. Bloodgood, 7 Johns. Ch. 90; s. c. 11 Am. Dec. 417; Boardman v. Lake Shore &c. R. Co., 84 N. Y. 157; March v. Eastern R. Co., 48 N. H. 515; s. c. 77 Am. Dec. 732; Gifford v. Thompson, 115 Mass. 470; Granger v. Bassett, 98 Mass. 462; Goodwin v. Hardy, 57 Me. 143; Brewster v. Lathrop, 15 Cal. 21; Ryan v. Leavenworth &c. R. Co., 21 Kan. 365; King v. Follett, 3 Vt. 385; Foote's Appeal, (1839) 22 Pick. 299; Minot v. Paine, (1868) 99 Mass. 101; Rand v. Hubbell, 115 Mass. 461; Phelps v. Farmers' &c. Bank, 26 Conn. 269; Bailey v. Railroad Co., 22 Wall. 604, 637; Jermain v. Lake Shore &c. R. Co., (1875) 91 N. Y. 483; Brundage v. Brundage, 60 N. Y. 544; Jones v. Terre Haute &c. R. Co., (1874) 57 N. Y. 196; Currie v. White, 45 N. Y. 822; Hill v. Newichawannick Co., 48 How. Pr. 427; Central R. &c. Co. of Georgia v. Papot, 59 Ga. 342; Coleman v. Coleman &c. Co., 51 Pa. St. 74; Ryan v. Leavenworth &c. R. Co., 21 Kan. 365; Paris v. Paris, 10 Ves. 184; Clive v.

Clive, Kay, 600; Ibbotson v. Elam, L. R. 1 Eq. 188; Bates v. McKinley, 31 Beav. 280; Black v. Homersham, 4 Ex. Div. 24.

² Jones v. Ogle, (1872) L. R. 14 Eq. 419; 33 and 34 Vic. ch. 35.

³ Clapp v. Astor 2 Edw. Ch. 379.

⁴ Phelps v. Farmers' &c. Bank, 26 Conn. 269. As to preferred shares the rule holds true also. Boardman v. Lake Shore &c. R. Co., 84 N. Y. 157; Nickals v. New York &c. R. Co., 15 Fed. Rep. 575; Jermain v. Lake Shore &c. R. Co., (1875) 91 N. Y. 483; Hyatt v. Allen, 56 N. Y. 553; Coey v. Belfast &c. Ry. Co., Irish R. 2 C. L. 112.

⁵ City of Ohio v. Cleveland &c. R. Co., (1856) 6 Ohio St. 489; Manning v. Quicksilver &c. Co., (1881) 24 Hun, 361. Although bargains in prospective dividends are transactions which the Stock Exchange does not recognize nor enforce, they have been said to be not contrary to law, and are valid as between the parties. Marten v. Gibbon, 33 L. T. N. S. 561.

signment by the shareholder, before he has received it from the company.¹ But a contract by a shareholder in reference to dividends and profits on his shares includes only dividends or profits declared by the corporation and allotted to shareholders, not profits ascertained by third persons or courts.² Accordingly, where a person was entitled under a contract to the dividends upon certain shares for five years and none were declared until two years afterwards, when nearly a hundred per cent. was declared, it was held that no apportionment could be made, although it was declared largely from profits accruing during the five-year period; and also that such a contract refers to dividends to be ascertained and declared by the corporation, and not to the growing profits from day to day or month to month to be ascertained by third persons or courts of justice looking into the accounts and transactions of the company.³

§ 620. The same subject continued.—The corporation is bound to recognize as stockholders only those having the legal title to stock as shown by its books, and therefore it is not bound to pay dividends to an unregistered transferee, even when it has notice of the transfer.⁴ But the right to dividends

¹ *Marten v. Gibbon*, 33 L. T. N. S. 561. Cf. *Jermain v. Lake Shore & C. R. Co.*, 91 N. Y. 483.

² *Hyatt v. Allen*, (1873) 56 N. Y. 553; *Williams v. Western & C. Co.*, (1883) 93 N. Y. 162, affirming 61 How. Pr. 217.

³ *Clapp v. Astor*, (1834) 2 Edw. Ch. 379.

⁴ *Stockwell v. St. Louis Ins. Co.*, 9 Mo. App. 133; *Continental National Bank v. Eliot National Bank*, (1881) 7 Fed. Rep. 369; *Erwin v. Oregon Ry. & C. Co.*, 35 Hun. 544; *Merchants' & C. Bank v. Richards*, 6 Mo. App. 654; *Bright v. Lord*, 51 Ind. 272; *Wright v. Tuckett*, 1 J. & H. 266. In England, the Companies Clauses Act of 1845 provides that until the deed of transfer be delivered to the secretary of the corporation for the purpose of registration,

the purchaser is not entitled to any share in the profits of the undertaking, nor to vote upon the stock at corporate meetings. 8 Vic. ch. 16, § 15. An unregistered transferee can not enforce the payment of a dividend at law, but must bring his bill in equity. *Cleveland & C. R. Co. v. Robbins*, 35 Ohio St. 483; *Chambersburgh Insurance Co. v. Smith*, 11 Pa. St. 120; *Northrup v. Curtis*, 5 Conn. 246. And mere possession of the certificate of stock or even a special property therein by a person not their owner, is not sufficient ground upon which to base an action for dividends. *Dow v. Gould & C. Mining Co.*, 31 Cal. 629. Where an owner of bank-stock directs another to obtain all the money possible thereon, and pay the owner's debt to a bank, and adds: "You

declared after the date of the transfer passes to the vendee as between him and his vendor, even where the transfer has not been recorded on the corporate books.¹ And after the company has been notified of a transfer of stock, although registration thereof has not been made upon the corporate records, the dividend may safely be paid to the transferee.² But if the company has allowed a shareholder to have his stock transferred upon the books without a surrender of the certificates, it will not be protected in paying dividends to the transferee as against the holder of the certificates,³ although a stock-owner to whom no certificate has been issued is not thereby

may apply any and all balance towards the payt. of my indebtedness to you," there is no assignment of the stock to the latter, and, after his debt is paid, he can not maintain an action for dividends due thereon. *Ware v. Merchants' Nat. Bank*, (Mass. 1890) 24 N. E. Rep. 328. Where, after a contract for the sale of certain shares in the stock of a corporation, but before the time appointed for receiving payment and making delivery, a dividend is declared, as to which there is no express stipulation in the contract, the purchaser has no right to decline acceptance and making payment because the seller claims the dividend as his own. *Phinzy v. Murray*, (Ga. 1890) 10 S. E. Rep. 358. In an action for the transfer of stock, and the payment of dividends, brought against the stockholder in whose name the shares are, and against the corporation, the latter has no interest at stake, and has no right to prosecute an appeal from a judgment rendered contradictorily with both parties defendant, in favor of plaintiff, where the real party in interest, the stockholder, has not appealed, and the judgment has become final and executory. *Board of Liquidation v. New Orleans Water Works Co.*, (1887) 39 La. Ann. 202.

¹*March v. Eastern R. Co.*, (1862) 43 N. H. 515; s. c. 77 Am. Dec. 732; *Central R. & C. Co. of Georgia v. Papot*, 59 Ga. 342; *Ambrose v. Riddle*, 3 Md. Ch. 320; *Goodwin v. Hardy*, 57 Me. 143; *Foote, Appellant*, 22 Pick. 299; *King v. Follett*, 3 Vt. 385; *Ryan v. Leavenworth & C. R. Co.*, 21 Kan. 365, 403; *Black v. Homersham*, 4 Ex. Div. 24; *Bates v. McKinley*, 31 L. J. Ch. 389; *Clive v. Clive, Kay*, 600; *Jones v. Terre Haute & C. R. Co.*, (1874) 57 N. Y. 196; *Currie v. White*, 45 N. Y. 822; *Hill v. Newichawanick Co.*, 48 How. Pr. 427; *Brundage v. Brundage*, 60 N. Y. 544; s. c. 65 Barb. 397; *Clapp v. Astor*, (1834) 2 Edw. Ch. 379. *Cf. Boston & C. R. Co. v. Commonwealth*, 100 Mass. 399; "Title to Dividends," 19 Am. Law Rev. 571; *Nickals v. New York & C. Ry. Co.*, 21 Blatchf. 177; *Johnson v. Bridgewater & C. Co.*, 14 Gray, 274.

²*Smith v. American Coal Co.*, 7 Lans. 317; *Hill v. Newichawanick Co.*, 48 How. Pr. 427; *Bell v. Lafferty*, 1 Pennyp. 454.

³*Bank v. Lanier*, (1870) 11 Wall. 369; *Brisbane v. Delaware & C. R. Co.*, 25 Hun, 438; *Lowry v. Commercial & C. Bank, Taney*, 310; *Magwood v. Railroad Bank*, 5 S. C. 379; *Brewster v. Lime*, 42 Cal. 139.

debarred from claiming his dividends.¹ A corporation may always refuse to pay dividends to any one who has obtained a fraudulent transfer of stock upon the books of the company. It is the legal duty of the corporation to refuse payment under such circumstances.² And where dividends have been actually paid to such parties before discovery of the fraud, there being no fault upon the part of the original owner, he is entitled, as against the corporation, to demand the dividends or their equivalent.³ That it is found convenient to close the transfer books of a company for any purpose, does not in any way impair the legal rights of a stockholder to share in dividends subsequently declared, although the closing of the books would to some extent embarrass the transfer of stock.⁴ The usage of the stock exchange that all stocks sold before the books of the company are closed are "dividend on" and carry the forthcoming dividend to the buyer, while all subsequent transfers are "en dividend," that is, the dividend belongs to the seller, has no application to transfers not made in the exchanges.⁵

§ 621. (b) Upon liability for calls.—While each assignor and assignee of shares is liable to the corporation for calls made upon the stock until the full par value has been paid, between the assignor and assignee there is no obligation implied on the part of the former to pay calls made after his transfer against a prior assignor.⁶ So also when a lawful

¹ *Ellis v. Proprietors of Essex-Merimac Bridge*, 2 Pick. 243.

² 2 *Redfield on Railways*, 540.

³ *Davis v. Bank of England*, 2 Bing. 393; *Taylor v. Midland R. Co.*, 28 Beav. 287; *Sloman v. Bank of England*, 14 Sim. 775; *Ashley v. Blackwell*, 2 Edw. 299.

⁴ *Jones v. Terre Haute &c. R. Co.*, (1874) 57 N. Y. 196; affirming *s. c.* 20 Barb. 363; *Luling v. Atlantic &c. Co.*, 45 Barb. 510; *Phelps v. Farmers' &c. Bank*, 26 Conn. 269; *March v. Eastern R. Co.*, 43 N. H. 515; *Foote's Appeal*, 22 Pick. 299; *Rider v. Alton &c. R. Co.*, 13 Ill. 516; *Reese v. Bank of Montgomery Co.*, 31 Pa. St. 78.

⁵ *Lombards v. Case*, 45 Barb. 95; *Hill v. Newichawanick Co.*, 8 Hun, 459.

⁶ Note to *Jennings v. Bank of California*, 12 Am. St. Rep. 145, 152, citing: *Brinkley v. Hambleton*, 67 Md. 169. Cf. *West Nashville &c. Co. v. Nashville S. Bank*, 86 Tenn. 252; *s. c.* 6 Am. St. Rep. 835, and note 838, 839; *Caulkins v. Gas Light Co.*, 85 Tenn. 683; *s. c.* 4 Am. St. Rep. 786, and note 798; *Supply Ditch Co. v. Elliott*, 10 Colo. 327; *s. c.* 3 Am. St. Rep. 586, and note 594; *Lippitt v. American Wood Paper Co.*, 15 R. I. 141; *s. c.* 2 Am. St. Rep. 886, and note 891; *Young v. South Trade-*

agreement has been entered into by the stockholders of a corporation, by the terms of which new obligations are imposed on the stock, one purchasing some of the shares takes them subject to the agreement, and can only demand a certificate conforming to the agreement.² In like manner where a subscriber to the stock of a manufacturing corporation agrees in the usual form to pay it, makes partial payments, and, at a time when there were no calls, makes a transfer in good faith, and new certificates are issued by the company in accordance therewith, the assignee becomes liable for the balance of the payments, and neither the company nor its receiver can maintain an action for the balance against the original subscriber and assignor.³ Where stock has been subscribed for but not taken by the subscribers, and is then transferred as treasury stock to the company, which afterwards sells it to third parties for less than its face value, the original subscribers can not be held to liability as assignors of the stock.³ In an

gar Iron Co., 85 Tenn. 189; s. c. 4 Am. St. Rep. 752, and note 759; Taylor v. Weston, 77 Cal. 534. A subscriber to the capital stock of a corporation who has in good faith transferred his shares to another, which transfer has been accepted by the corporation, before an assessment is made, is not liable for the unpaid subscription. Stewart v. Walla Walla &c. Co., (1889) 20 Pacif. Rep. 605. In Maine a purchaser of stock assessable upon its face, or by the charter or by-laws of the corporation, and payable by installments, is liable for the amount remaining unpaid as if an original subscriber, and chargeable with notice of any such unpaid balances, whether purchased of the corporation or in open market. Libby v. Tobey, (Me. 1890) 19 Atlán. Rep. 904. A transferee of stock of a corporation who signs a paper purporting to be an original subscription, and expressly agrees to pay the amount subscribed as the board of directors may order, assumes the liability of an original

stockholder, and is liable for the amount of the unpaid subscription. Citizens' &c. Co. v. Gillespie, (1887) 115 Pa. St. 564.

¹ Campbell v. American Zylonite Co., (1889) 55 N. Y. Super. Ct. Rep. 562.

² Billings v. Robinson, 28 Hun, 122. Daniels, J., dissenting.

³ Alling v. Ward, (Ill. 1890) 24 N. E. Rep. 551. It was further held in this case that such stock, though purporting to be full paid, will, when called in question by creditors of the corporation, be held to be paid up only to the amount that was actually paid for it, within the meaning of Rev. Stat. Ill. ch. 32, § 8, which makes stockholders liable for corporate debts for the amount unpaid upon the stock. The statutes of Oregon provide that a transferee of corporate stock is subject to the payment of balances due thereon; and where a debtor to the company conveyed all his stock to one as trustee, to sell it to any one who would pay its indebtedness to the corporation, and

action against a stockholder by the trustee of an insolvent corporation appointed by a competent court to collect unpaid subscriptions to its stock for the benefit of its creditors, it is no defense that subsequent to his appointment the trustee obtained an order from the court permitting him to compromise with those stockholders who should pay within a given time a certain per cent. of the call assessed in the original decree.¹

§ 622. The same subject continued.— But where a purchaser of shares buys them supposing that they are full paid stock, he is not only relieved of the necessity of paying calls, but may rescind the contract and recover the payment.² He also has his remedy, for any actual damages he has sustained, against those by whose misrepresentations he was induced to take the stock,³ but he must, of course, show that misrepresentations were made and that he relied upon them.⁴ If the directors have participated in the profits of an issue of stock below par, *bona fide* transferees of the stock have recourse against them for the damages suffered.⁵

§ 623. Breach of the contract — Remedy.— When an action at law for damages on failure to perform the contract of transfer will afford the injured party an adequate remedy, equity will not, as a general rule, interfere for the purpose of decreeing specific performance against the defaulting party.⁶ Thus

get him a discharge therefrom, this was held to be no sale, and the trustee was not such a purchaser as would create a liability, as against him, for any unpaid balance on the stock. *Powell v. Willamette Val. R. Co.*, (1887) 14 Oregon, 356, construing Hill's Misc. Laws of Oregon, ch. 32, § 3230.

¹ *Hambleton v. Glenn*, (Md. 1890) 8 Ry. & Corp. L. J. 372. On the subject of the two preceding sections, see note to *Thompson v. Reno Savings Bank*, 3 Am. St. Rep. 860 and 866.

² *Sturges v. Stetson*, 1 Biss. 246, 253; *Messersmith v. Sharon Savings Bank*, 96 Pa. St. 440; *Fosdick v. Sturgess*, 1 Biss. 255; *Coolidge v.*

Goddard, (1885) 77 Me. 579; *Foster v. Seymour*, 23 Fed. Rep. 65.

³ *Cross v. Sackett*, 6 Abb. Pr. 247; *Barnes v. Brown*, (1880) 80 N. Y. 527; *In re Ambrose & Co.*, 14 Ch. Div. 390, 397; *In re Gold Co.*, 11 Ch. Div. 701, 713, 714.

⁴ *McAleer v. McMurray*, 58 Pa. St. 126; *Priest v. White*, 34 Alb. Law J. 298.

⁵ *Cross v. Sackett*, 6 Abb. Pr. 247; *In re Gold Co.*, 11 Ch. Div. 701.

⁶ *Duncuft v. Albrecht*, 12 Sim. 198; *Ross v. Union Pacific Ry. Co.*, 1 Woolw. 26, 32; *Buxton v. Lister*, 3 Atk. 383; *Colt v. Netterville*, 2 P. Wms. 304; *Cuddee v. Rutter*, 1 P. Wms. 570; *Danforth v. Philadelphia & Co. Ry. Co.*, 30 N. J. Eq. 12; *Fallon*

a court of equity will not decree specific performance in the transfer of particular shares of stock.¹ Nor will the specific performance of a contract be ordered when the vendor is not in a position to perform, or when he does not own the stock he has contracted to sell, or has not a sufficient amount to fill the order he has accepted,² though in the latter case he will be compelled to perform to the extent of his ability by transferring the number of shares which he has.³ When, however, a court of equity refuses to give effect to the contract by compelling specific performance, it may give the suitor pecuniary compensation by awarding damages; that is, it may deny the relief prayed for and grant another in the same action.⁴

§ 624. Specific performance.—Equity will compel specific performance of the contract for the transfer of stock in cases where such a contract is part of one over which equity has jurisdiction for this purpose.⁵ And in cases where money damages can not afford adequate compensation, as when the vendee can not purchase the shares for which he has contracted for the amount to which he would be entitled as damages,⁶ provided, of course, the contract is otherwise proper, both as regards consideration and public policy.⁷ Either party may be entitled to specific performance of the contract, the

v. Railroad Co., 1 Dill. 121; *Turner v. May*, 32 L. T. N. S. 56; *Poole v. Middleton*, 29 Beav. 646; *Parish v. Parish*, 32 Beav. *Contra*, *Ross v. Union Pac. Ry. Co.*; 1 Woolw. 26, though this is *obiter*.

¹*Hubbell v. Drexel*, 21 Am. Law Reg. N. S. 452; *Hardenberg v. Bacon*, 33 Cal. 356.

²*Columbine v. Chichester*, 2 Phil. Ch. 27.

³*Turnure v. May*, 32 L. T. N. S. 56.

⁴*Austin v. Gillespie*, 1 Jones' Eq. 261; *Wason v. Fenno*, 129 Mass. 405.

⁵So where a stock transfer is involved in the enforcement of a trust the transfer will be ordered. *Taylor on Corporations*, § 790; *Draper v. Stone*, 71 Me. 175; *Coles v. Whitman*, 10 Conn. 121. So also where

the contract is part of a contract for the conveyance of land. *Leach v. Fobes*, 11 Gray, 506; s. c. 71 Am. Dec. 732; *Bissell v. Farmers' &c. Bank*, 5 McLean, 495; *Taylor on Corporations*, § 790.

⁶*Duncuft v. Albrecht*, 12 Sim. 189; *Cheale v. Kenward*, 3 De Gex & J. 27. *Acc. Todd v. Taft*, 89 Mass. 371; *Baldwin v. Commonwealth*, 11 Bush, 417; *Ashe v. Johnson*, 2 Jones' Eq. 149; *Johnson v. Brooks*, 93 N. Y. 337; *White v. Schuyler*, 1 Abb. Pr. N. S. 300; s. c. 31 How. Pr. 38; *Chater v. San Francisco &c. Co.*, 19 Cal. 219; *Cushman v. Thayer Manuf. Co.*, 76 N. Y. 368.

⁷*Mississippi &c. R. Co. v. Cromwell*, 91 U. S. 643.

vendor as well as the vendee. Thus where the stock is in such a condition that some liability is imposed upon the registered owner, the vendor is entitled to an order or decree in equity compelling the vendee to have the transfer recorded on the books of the company.¹

§ 625. **Avoidance of the contract.**—Where the stock has been attached in the hands of the vendor, it is sufficient ground for the refusal of the vendee to take it.² And as is the rule in respect of contracts generally, fraud and fraudulent misrepresentations on the part of the vendor or his agent³ constitute a valid ground for refusing to take shares of stock which one has contracted to purchase.⁴ This rule has been applied where it was falsely represented the property of the corporation was unincumbered;⁵ that its affairs were prosperous;⁶ that certain persons of influence were members of the corporation;⁷ that certain dividends were to be guaranteed by the company;⁸ that a dividend was about to be made, thus giving the stock a standing as a good investment;⁹ that the stock was full paid stock and not subject to calls.¹⁰ So where the vendor instigates employees to make false memoranda and statements as to the condition of the company, the vendee may refuse to take the shares.¹¹ There is a class of cases in which circumstances are relied upon as evidence of fraud in which it is held that the contract is valid,

¹ *Paine v. Hutchinson*, L. R. 3 Eq. 257; s. c. L. R. 3 Ch. 388; *Walker v. Bartlett*, 2 Jur. N. S. 643; s. c. 18 C. B. 845.

² *Eastman v. Fiske*, 9 N. H. 182.

³ *Smith v. Tracy*, 36 N. Y. 78.

⁴ *Bradley v. Pool*, 98 Mass. 169; *Gammill v. Johnson*, (Ark. 1887) 1 S. W. Rep. 610; *Wakeman v. Dalley*, 51 N. Y. 27; *Nelson v. Luling*, 62 N. Y. 645; *Schenwenck v. Naylor*, 102 U. S. 638; *Gordon v. Parker*, 10 La. Rep. 56; *Beach on Railways*, §§ 131, 132, 135, 136. The intent to deceive must be proven. *Bellaires v. Tucker*, 13 Q. B. Div. 563; *Southwestern R. Co. v. Papot*, 67 Ga. 775, 692. But the fraud need not have

been the sole inducement to the contract. *Morgan v. Skiddy*, 62 N. Y. 319, 328.

⁵ *Southwestern R. Co. v. Papot*, 67 Ga. 775.

⁶ *Cazeaux v. Mali*, 25 Barb. 578.

⁷ *Miller v. Barber*, 66 N. Y. 558.

⁸ *Gerhard v. Bates*, 20 Eng. L. & Eq. 129.

⁹ *Lawton v. Kittridge*, 30 N. H. 500.

¹⁰ *Sturges v. Stetson*, 1 Biss. 246; *Fosdick v. Sturges*, 1 Biss. 255; *Cross v. Sackett*, 2 Bosw. 617. *Contra*, *Nelson v. Luling*, 62 N. Y. 645. *Cf.* *Colt v. Woollaston*, 2 P. Wms. 154; *Seaman v. Law*, 4 Bosw. 337.

¹¹ *Hagar v. Thompson*, 1 Black, 80.

and no presumption of fraud is raised. Thus where the vendor states that the stock is worth its full par value, the contract will stand, for such a statement is an expression of opinion as distinguished from misrepresentation of a material fact.¹

§ 626. Remedies for fraud and misrepresentation.—It may be stated as a general rule that the vendee of stock will be released from the obligations of his contract in cases where there is such a degree of deceit practiced upon him as would entitle the vendee of ordinary personal property to similar relief, and equity will afford him affirmative relief.² So the whole transaction may be set aside by means of a bill in equity, which is the most effective remedy, for the reason that, in order to entitle the party to the relief prayed for, it is not necessary to show actual fraud, fraud being often presumed from certain facts and circumstances which, at law, will not constitute a cause of action.³ Thus even when representations are innocently made, the vendor will often be called upon, in equity, to make them good.⁴ When a transferee finds that he is a victim of misrepresentation, he may, of course, affirm or repudiate the contract, but in the latter case he should make a tender of the stock to the vendor and ask to be reinstated in the position existing before the contract was made,⁵ and he should act promptly. Thus when he has given a note in payment for the stock he should repudiate the contract and make a tender of the stock, for it is not a defense to an action on such a note that the transaction was tainted with fraud.⁶ The injured party also has a remedy at law for damages.⁷ In some cases where individuals have combined for the purpose of influencing the price of stock by false

¹ *Union Nat. Bank v. Hunt*, 76 Mo. 439.

² *Taylor on Corporations*, § 792.

³ *Arkwright v. Newbold*, 17 Ch. Div. 301.

⁴ *Jones v. Bolles*, 9 Wall. 364; *Bradley v. Luce*, 99 Ill. 234; *Johnson v. Kirby*, 65 Cal. 482; *Stainbank v. Fernley*, 9 Sim. 556; *Peek v. Gurney*, L. R. 5 N. H. 377; *Hill v. Lane*,

L. R. 11 Eq. 215; *Campbell v. Fleming*, 1 Adol. & El. 40. But see *Ogilvie v. Currie*, 37 L. J. Ch. 541.

⁵ *Francis v. New York & C. R. Co.*, 17 Abb. N. C. 1.

⁶ *Gifford v. Cahill*, 29 Cal. 589.

⁷ *Miller v. Barber*, 66 N. Y. 558; *Nelson v. Luling*, 62 N. Y. 645; *Wakeman v. Dalley*, 51 N. Y. 27; *Newbery v. Garland*, 31 Barb. 121.

representations they may become liable to a criminal prosecution for conspiracy.¹

§ 627. **Transfers otherwise than by contract.**—The title to stock may be transferred by gift, may be the subject of gift² and by will.³ Great care should be exercised by the company, however, in such cases, for it is charged with the duty of trustee toward the stockholders for many purposes, and must, therefore, exercise due diligence to protect the interest of its *cestui que trust*.⁴ Where a certificate of stock issued to one as legatee it gives him title subject to all the conditions imposed upon it by the will. If the corporation allows him to surrender his certificate and issues to him in lieu thereof a certificate with no mention of the fact that it is subject to such will, it will be answerable for injury therefrom.⁵ If a trustee under a will, on demanding of a corporation a transfer of shares of stock standing in the name of his testator upon the books of the corporation, presents to the corporation certified copies of the will and of his appointment as trustee, as evidence of his authority to demand a transfer, the corporation has no right to require that the copies shall remain in its custody.⁶ Under a provision in the charter of a corpora-

¹ Regina v. Brown, 7 Cox's Crim. Cas. 442; Regina v. Esdaile, 1 Fost. & F. 213. Cf. United States v. Britton, 108 U. S. 199.

² De Caumont v. Bogert, 36 Hun, 382. Provided the gift is one which is in other respects lawful. Nickerson v. English, (1886) 142 Mass. 267. Simple delivery has been said to be sufficient. Reed v. Copeland, 50 Conn. 472. *Contra*, Baltimore & Co. v. Mali, 66 Md. 53. A gift of stock *causa mortis* may be made by mere delivery of the certificates without any written transfer. Walsh v. Sexton, 55 Barb. 251; Allerton v. Lang, 10 Bosw. 362. Except where there are other formalities prescribed by statute. Moore v. Moore, 43 L. J. Ch. 617. And the gift once duly made can not be revoked. Delama-

ter's Estate, 1 Whart. (Pa.) 362; Standing v. Bowring, 27 Ch. Div. 341; Dummer v. Pitcher, 5 Sim. 35. Except in the case of the recovery of the donor where the gift is *causa mortis*. Stainland v. Willott, 3 Mac. & G. 664.

³ Millard v. Bailey, L. R. 1 Eq. 378; Barton v. Cooke, 5 Ves. 461; Caulkins v. Gas-Light Co., (1887) 85 Tenn. 683; s. c. 4 Am. St. Rep. 786; Eckfeld's Estate, 7 Week. Notes Cas. (Pa.) 19.

⁴ Caulkins v. Gas-Light Co., (1887) 85 Tenn. 683; s. c. 4 Am. St. Rep. 786.

⁵ Caulkins v. Gas-Light Co., (1887) 85 Tenn. 683; s. c. 4 Am. St. Rep. 786.

⁶ Bird v. Chicago, Iowa & C. R. Co., 137 Mass. 428.

tion that on the death of a shareholder his heirs or legal representatives might continue the relation, it was held that the right to continue the membership was in the heirs or devisees, and not in the personal representative.¹ Where a testator's bank-stock is sought to be transferred by the executrix, nine years after the testator's death, and six years after the period limited by law for the settlement of estates has elapsed, not to another person to raise money for the estate, but to herself individually, for the purpose of securing a note on which she is indorser for a third person, the circumstances are sufficient to put the bank on inquiry as to her authority.² In England provision is made by statute³ for the registration of stock in case of its transfer by death, bankruptcy or marriage, thus recognizing, by implication, the validity of a transfer by that means.⁴

§ 628. Transmission of interest in voluntary associations.

Membership of a club which is purely literary or social or scientific, and does not own property, can not be considered a right of property, nor is the right of meeting the other members a vested right of which the courts can take cognizance.⁵ But a member of such a voluntary association as one formed for social purposes or the facilitation of business, has undoubt-

¹ *Montgomery Mutual Building & Loan Assoc. v. Robinson*, 69 Ala. 413. *Cf. Security Loan Assoc. v. Lake*, 69 Ala. 456.

² *Peck v. Bank of America*, (R. I. 1890) 19 Atlan. Rep. 369.

³ 8 Vic. ch. 16, § 18.

⁴ *Societe Generale de Paris v. Walker*, 14 Q. B. Div. 424; s. c. 11 App. Cas. 20; *Bradford Banking Co. v. Briggs & Co.*, 31 Ch. Div. 19; s. c. 12 App. Cas. 29; *Cork & Co. Ry. Co. v. Cazenove*, 10 Q. B. 935; *Leeds & Co. Ry. Co. v. Fearnley*, 4 Ex. 27; *Buchan's Case*, 4 App. C. 583.

⁵ *Waring v. Medical Soc.*, (Superior Ct., E. Dist. of Ga. 1869) 8 Am. L. Reg. N. S. 533, where the court said: "The only rights which the relator can have, as a member of the

society, are either, first, a right to property; second, a right to membership, with a view to the improvement of the science of medicine; third, a right to practice his profession and collect his fees; or, fourth, a right to meet the members of said society on social equality. Suppose the members of the society refuse to meet with the relator, refuse to discuss medical science with him, refuse to exert any effort, physical or mental, to carry out the purposes of the society, what power of compulsion has this court which it can bring to bear on such reculant members? The bare question shows its impracticability. I must therefore refuse the *mandamus*."

edly an interest in the general assets of the association as long as he remains a member,¹ which is *prima facie* equal or proportionate.² So a bill may be maintained by the members of a voluntary association, for themselves and other members, to compel a trustee to join with his co-trustees in an assignment to their successors of funds of the association on deposit in a savings bank.³ But in absence of any rule to the contrary governing such an association, a member has no severable or transmissible interest or the right to any proportion of the assets upon ceasing to be a member, although upon dissolution a member would be entitled to share in the effects.⁴ Where a voluntary fire company was chartered by the legislature, and its officers were commissioned by the governor, but had no capital stock, and could not acquire property except by donation, and the only compensation of its members was relief from militia and jury duty, it was held that the heirs of a deceased member had no interest in its property on its dissolution.⁵ On the death of a member of a proprietary company, however, his interests and rights descend to his heirs or devisees.⁶ A seat in the New York Stock Exchange is property, and subject to the payment of debts. The court may order its assignment to one qualified under the rules of the exchange to hold it. Nor is the exchange a necessary party to the proceeding to compel a transfer.⁷ And one who, by becoming a member of the New York Stock Exchange, agrees that his seat may be disposed of among his creditors in the exchange in a certain manner, is bound by his agreement.⁸ So a by-law of the board regulating the disposal of seats upon the decease of members, is binding upon the personal repre-

¹ *In re St. James' Club*, 2 De Gex, M. & G. 383, 387; s. c. 16 Jur. 1075, 1076; s. c. 13 Eng. L. & Eq. 589, 592.

² *McMahon v. Rauhr*, 47 N. Y. 67; *Belton v. Hatch*, 109 N. Y. 593; s. c. 4 Am. St. Rep. 495.

³ *Birmingham v. Gallagher*, 112 Mass. 190.

⁴ *In re St. James' Club*, 2 De Gex, M. & G. 383, 387; s. c. 16 Jur. 1075, 1076; s. c. 13 Eng. L. & Eq. 589, 592; *McMahon v. Rauhr*, 47 N. Y. 67, 70;

Belton v. Hatch, 109 N. Y. 593; s. c. 4 Am. St. Rep. 495; *White v. Brownell*, 2 Daly, 329, 356; s. c. 4 Abb. Pr. N. S. 162, 191.

⁵ *Mason v. Atlanta Fire Co.*, 70 Ga. 604; s. c. 48 Am. Rep. 585.

⁶ *Angell & Ames on Corporations*, (11th ed.) § 214, citing 2 *Dane's Abridgment*, 698.

⁷ *Londheim v. White*, 67 How. Pr. 467.

⁸ *Weston v. Ives*, 97 N. Y. 222.

sentatives of a deceased member.¹ A purchaser can not acquire a title to a seat in the Stock Exchange freed from the debts of a former owner to members of the board.²

§ 629. Transfer of shares in cost-book mining companies.

In mining communities mines are usually operated by what are known as mining partnerships with different rights and liabilities attaching to their members from those attaching to ordinary companies or trading partnerships. They are formed by the association of a number of persons who have obtained permission to work a lode; the number of shares into which their capital is to be divided is determined and an allotment of shares is made to each member. One of their number, commonly called the "purser," is appointed to manage the affairs of the mine, and the minutes of their proceedings are entered in a book, called the "cost-book," and signed by all the parties. The cost-book contains the names of all the shareholders, and the number of shares held by each is set opposite his name. A shareholder may get rid of his shares and his liabilities so far as his partners are concerned, without their consent, and without dissolving the partnership, either by a transfer or a simple relinquishment, providing the cost-book rules do not prohibit it, the fact of the transfer being entered by the purser in the cost-book, or simple notice of relinquishment being given the purser.³ Members of a mining association, therefore, have no right to object to the admission of a stranger into the association, who buys shares of one of their associates,⁴ for the *delectus personæ* which is essential to constitute an ordinary partnership has no place in these mining associations.⁵ The mode of transferring shares is simple, and

¹ *Thompson v. Adams*, 12 Phila. 484; s. c. 93 Pa. St. 55.

² *Thompson v. Adams*, 12 Phila. 484; s. c. 93 Pa. St. 55. In this case one who furnished the money with which a member of the Philadelphia brokers' board purchased his seat, upon the death of the member claimed an equitable ownership in the proceeds of the sale of the seat, as against the creditors of the member within the board, who claimed

the proceeds under their constitution and by-laws, and it was held that the former could not maintain his claim.

³ *Collier on Mining*, 93; *Skillman v. Lackman*, 23 Cal. 203; *Dickinson v. Valpy*, 10 B. & C. 128; *Ricketts v. Bennett*, 4 C. B. 686.

⁴ *Bissell v. Foss*, (1884) 114 U. S. 252.

⁵ *Kahn v. Smelting Co.*, (1880) 102 U. S. 641, citing *Duryea v. Burt*, 28

effected with great facility, and in any form, and the mere entry by the pursuer in the cost-book of the fact of transfer is sufficient to bind all parties, and constitutes the introduction of a new partner into the concern.¹

§ 630. Transfer of shares in national banks.—The statutes of the United States and not those of the States regulate the transfer of the stock of national banks, though no exclusive method of transfer is prescribed by the national banking act.² And while it is of the utmost importance that the liability of stockholders of national banks should be rigorously enforced, it is declared that the court should not treat them with exceptional severity, and apply to their transfers different rules from those which obtain in other business transactions.³ So where a shareholder of a national bank makes a *bona fide* sale of his stock, and goes with the purchaser to the bank, indorses the certificate, and delivers it to the cashier of the bank, with directions to make the transfer on the books, he has done all that is incumbent upon him to discharge his liability.⁴ Likewise in a State the courts of which lean strongly against unrecorded transfers; but where the statute gives no peculiar rights to attaching creditors of stock so transferred, precedence will be given to an unrecorded transfer of the stock of a bank which has passed no by-law on the subject, over a subsequent attachment by a creditor of the assignor.⁵

Cal. 569; *Settembre v. Putnam*, 30 Fed. Rep. 319; s. c. 6 Ry. & Corp.
Cal. 490; *Taylor v. Castle*, 42 Cal. L. J. 324; *Whitney v. Butler*, 118
367. U. S. 655.

¹ Wharton's Law Lexicon, *tit.* ⁴ *Hayes v. Shoemaker*, (1889) 39
"Cost-Book Mining Companies." Fed. Rep. 319; s. c. 6 Ry. & Corp.

² *Scott v. Pequonnock Bank*, 15 L. J. 324.
Fed. Rep. 494.

⁵ *Scott v. Pequonnock Bank*, 15
³ *Hayes v. Shoemaker*, (1889) 39 Fed. Rep. 494.

CHAPTER XXXII.

EXECUTION AND ATTACHMENT OF SHARES, AND HEREIN OF PLEDGE AND THE CORPORATE LIEN.

§ 631. Introductory.

632. Execution and attachment of shares — (a) In general.

633. (b) In foreign corporations.

634. (c) By creditors of the transferor.

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636. (d) By creditors having knowledge of the transfer.

637. (e) By creditors of the transferee.

638. Pledge and mortgage distinguished.

§ 639. The pledgee's rights — (a) In general.

640. (b) To registration.

641. (c) To receive dividends.

642. (d) To vote.

643. Foreclosure of pledge.

644. The company's lien upon shares.

645. Statutory and charter liens.

646. Distinction between statutory and other liens.

§ 631. **Introductory.**— Questions respecting executions and attachment of shares of stock are so intimately connected with liens thereon in favor either of the corporation or of the shareholder's pledgee that it has been found convenient to treat them together in a single chapter; for example, what are the rights of a judgment creditor as against the pledgee of his debtor's shares?¹ what is the effect of a levy upon shares held only as collateral security for a loan?² how far are the rights of a judgment creditor affected by his knowledge that the shares have been transferred or are held in pledge?³ how far does the company have a lien for unpaid subscriptions to stock as against the shareholder's transferee, pledgee or judgment creditor?⁴ "*Bona fide* creditors," as against whom transfers of certificates of stock in a private corporation are required to be entered on the books of the corporation, under the Alabama code, are judgment creditors who have acquired a lien; and when the lien of the execution has attached before notice to the creditor, the purchaser at the sale will be protected although he had actual notice of a

¹ *Vide infra*, § 634.

² *Vide infra*, § 637.

³ *Vide infra*, § 636.

⁴ *Vide infra*, §§ 644-646.

prior unregistered transfer.¹ Where stock is transferred in trust for the benefit of the transferrer, and the transferee in trust is registered on the books of the corporation, the equitable title remains in the *cestui que trust* and he is entitled to a re-transfer of the stock on the corporate books as against the assignee in insolvency of his trustee.² A trustee, who has in bad faith prevented a sale of his trust stock while it was of value, is liable to his *cestui que trust*, in the absence of proof of market value of shares when the sale could have been made, and of the receipt of any dividends or interest by the shareholders, for the amount paid in, with interest, from the time the trust was acknowledged;³ and a sale of stock under conditions, among others, that the vendor would receive it back at an advanced price, and offers to purchase and statements of value, intended evidently only to inflate the stock, are not evidences of value.⁴ In New York certain transfers of stock by corporations in trust are prohibited by the Stock Corporation Law of 1890; as when the corporation shall have refused to pay any of its notes or other obligations when due, none of its property shall be transferred or assigned for the payment of its debts, nor shall any corporate property or any stock therein be assigned in contemplation of insolvency.⁵

§ 632. Execution and attachment of shares — (a) In general.—Shares in companies having capital stock are subject to execution and attachment.⁶ It is expressly declared by stat-

¹ *Jones v. Latham*, 70 Ala. 164, construing Ala. Code, § 2043.

² *Sibley v. Quinsigamond Bank*, 133 Mass. 515.

³ *Snyder v. McComb*, (1889) 39 Fed. Rep. 392; s. c. 6 Ry. & Corp. L. J. 312.

⁴ *Snyder v. McComb*, 39 Fed. Rep. 392; s. c. (1889) 6 Ry. & Corp. L. J. 312.

⁵ N. Y. Laws of 1890, ch. 564, § 48.

⁶ *Union National Bank v. Byram*, (Ill. 1889) 7 Ry. & Corp. L. J. 148, where Magruder, J., said: "In *People v. Manufacturing Co.*, 99 Ill. 355, we said: 'The property of a stock-

holder consists of his right to a share in the net assets of the corporation, proportionate to the number of shares to which he has title.' Bouvier defines a 'right' as 'a well-founded claim.' Whatever may be the correct definition of the word 'rights,' as used in § 8 (of Ill. Rev. Stat. ch. 11, the Attachment Act), it refers to some kind of property interest, which is incorporeal in its character, and not to that species of property which is capable of being actually and corporeally seized by the sheriff. 'Effects' are defined to be 'property or worldly substance,' and as denoting 'property in a more extensive

ute in some States that the shares of stock of any person in an incorporated company are personal property and may be levied on by execution and attachment and sold as goods and chat-

sense than goods.' 1 Bouv. Law Dict. 579; 1 Schouler on Personal Property, § 16. A share of stock can not be regarded otherwise than as 'property,' nor can it be said that it is not 'worldly substance.' By the use of the word 'attached' in §§ 53, 54, and 55 (of Ill. Rev. Stat. ch. 77, the Execution Act), as above quoted, the legislature assumed that provision had already been made for attaching shares of stock. It will not be presumed that this assumption was a mistaken one, unless it clearly appears to be so. When § 8 of the Attachment Act making use of terms which are broad enough to embrace shares of stock is carefully studied in connection with said §§ 53, 54, and 55, it is evident that the latter sections refer back to said § 8, and point to it as the provision for attaching corporate stock, which is assumed to exist. Nearly twenty years before July 1, 1872, this court had said in *Newhall v. Buckingham*, 14 Ill. 405: 'Under our statute, whatever is the subject-matter of seizure and sale on execution may be taken in the proceeding by attachment, and held subject to sale on the judgment that may be recovered.' There is no such difference between the statute now in force and the statute of 1845, which was in force when the *Newhall* Case was decided, as would make the statement in the quotation any the less true now than it was then. The objection that the statute provides no mode of levying the writ of attachment will also disappear upon a comparison of the Attachment Act with the act in regard to judgments and executions. Section 26 of the Attachment Act pro-

vides that 'the practice and pleadings in attachment suits, except as otherwise provided in this act, shall conform, as near as may be, to the practice and pleadings in other suits at law.' The word 'practice,' as here used, includes the mode of serving mesne process and the mode of executing final process. It refers to the manner in which an attachment writ is to be levied, and also in the manner in which a writ of *fi. fa.*, or an execution, is to be levied. *Fleischman v. Walker*, 91 Ill. 318. The word 'levy' is applied to attachment writs as well as to executions. An attachment writ is levied upon personal property in the same way in which an execution is levied thereon. A 'levy' is defined by Bouvier to be a 'seizure,' and it is no less a seizure when made under an attachment than when made under an execution. The seizure is made in the same way under the one as under the other. The acts necessary to a valid levy of an attachment are equally essential to the valid levy of an execution, (2 Freeman on Executions, 2nd ed., § 262) and the converse of the proposition is also true. The object of the attachment of personal property is to seize and hold it until judgment is rendered, so that it may be taken and sold under execution. The object of levying an execution upon personal property is to seize and sell it, so as to make out of it the amount recovered by the judgment." The shares of a stockholder in a railroad corporation are liable to attachment; and by virtue thereof, the attaching creditor acquires a claim superior to that of a subsequent *bona fide* purchaser of

tels.¹ After shares of stock have been attached, and the corporation served, a transfer to a creditor of more shares than are necessary to secure his debt, for which there has been an equitable hypothecation, can not be made as against the attaching creditor.²

§ 633. (b) **In foreign corporations.**—In cases involving execution and attachment of stock in foreign corporations, the *situs* of the certificates is unimportant. Their seizure by execution or attachment would not be seizure or levy upon the stock itself without notice to the company. It is the *situs* of the corporation that determines.³ If it be doing business in the State in the capacity of a foreign corporation, shares of its stock can not be reached by levy, although its officers are present in the State engaged in carrying on its business there.⁴ But if the corporation by having its officers and transacting its business in a State other than of its origin, is deemed to be itself present as an entity in the foreign State in the same sense in which it is present in the State which created it, it may be conceded that its shares might be properly attached in the foreign jurisdiction.⁵ Accordingly, it has been held that where a foreign corporation was carrying on the business of making iron within Tennessee, and its officers and its general

the shares for value without notice of the attachment. *Shenandoah Valley R. Co. v. Griffith*, 76 Va. 913. But under Md. Act of 1886, ch. 287, which provides that no attachment or garnishment levied on corporate stock shall affect the rights of any pledgee, acquired before the levy, or prevent the pledgee and the corporation from transferring the shares on the company's books, the court does not, by the garnishment of a pledgee, obtain any control of the stock, and a bill does not lie for the appointment of a receiver, and to enforce the garnishment. *Morton v. Grafflin*, (1888) 63 Md. 545.

¹ Ala. Code of 1876, § 2041; R. I. Rev. Stat. ch. 196, § 21; ch. 197, § 9; ch. 212, §§ 18-20; R. I. Pub. Stat. ch. 207, § 22; ch. 208, § 9; ch. 223,

§§ 20-22; N. Y. Code Civ. Proc. § 647; Pa. Act of June 16, 1836; Conn. Gen. Stat. ch. 2, § 19; ch. 14, § 237; Wyoming Rev. Stat. §§ 2773, 2774.

² *Kyle v. Montgomery*, 73 Ga. 337.

³ *Young v. South Tredegar Iron Co.*, (1886) 85 Tenn. 189; s. c. 4 Am. St. Rep. 752.

⁴ *Plimpton v. Bigelow*, 93 N. Y. 592; s. c. 63 How. (N. Y.) Pr. 131; s. c. 13 Abb. (N. Y.) N. Cas. 173, holding that New York Code, § 647, applies only to domestic corporations, and reversing s. c. 29 Hun, 362.

⁵ *Dicta* in *Plimpton v. Bigelow*, 93 N. Y. 592, quoted with approval in *Young v. South Tredegar Iron Co.*, (1886) 85 Tenn. 189; s. c. 4 Am. St. Rep. 752.

office were required by its by-laws to be in that State, and all of its books, including its stock-books, were kept therein, its elections of directors held therein, and its directory, plant and property were located therein, it was presumed that the corporation had complied with the law, and was to be deemed a domestic corporation, the stock of which, owned by a non-resident stockholder, was liable to attachment in Tennessee.¹

§ 634. (c) **By creditors of the transferrer.**—Where shares have been transferred by assignment of the certificates without registration upon the books of the company, two questions arise, to wit: whether creditors of the transferrer thereby lose the right to levy upon the shares; and whether the transferee acquires thereby a property right which his creditors may subject to execution and attachment. These questions depend for their solution upon the distinction between legal and equitable titles.² The legal title to shares, assignable only on the company's books, does not pass by an assignment not so made and recorded.³ The unregistered transferee takes only an equitable title as between himself and his transferrer, or parties having actual knowledge of the transfer.⁴ Accord-

¹ *Young v. South Tredegar Iron Co.*, (1886) 85 Tenn. 189; s. c. 4 Am. St. Rep. 752. But see *Martin v. Mobile & O. R. Co.*, 7 Bush, 116.

² In England the House of Lords having decided that shares of stock are *choses in action*, (*Bank v. Whinney*, 11 App. Cas. 426) it is now held that an equitable assignment of stock without notice to the corporation relieves it of the claims of the judgment creditors of the assignee. *Arden v. Arden*, 29 Ch. Div. 702; *Beran v. Oxford*, 6 D. M. & G. 492; *Pickering v. Ilfrac. Ry. Co.*, L. R. 3 C. P. 235; *Robinson v. Nesbitt*, L. R. 3 C. P. 264; *Browne & Theobald's Ry. Law*, 76.

³ *Noble v. Turner*, (1888) 69 Md. 519; *Lippitt v. American Wood Paper Co.*, (1885) 15 R. I. 141; s. c. 2 Am. St. Rep. 886, and note 891. The assignment and delivery, as collateral, of certificates of stock trans-

ferable on the books of the company, on presentment, properly indorsed, passes an equitable title only; and where the assignee delays for seven years to notify the company of the assignment, or present the stock for transfer, pending which the stock is attached and sold as property of the assignor, and a transfer on the books made by the sheriff to the purchaser as authorized by statute, (Code Md. art. 10, § 19, and art. 26, §§ 205, 206, as amended by act 1868, ch. 471) his title is extinguished. *Noble v. Turner*, (1888) 69 Md. 519.

⁴ *Lippitt v. American Wood Paper Co.*, (1885) 15 R. I. 141; *Noble v. Turner*, (1888) 69 Md. 519. Stock certificates not being negotiable instruments, an assignee takes them subject to equities and defenses. *Young v. South Tredegar Iron Co.*, (1886) 85 Tenn. 189; s. c. 4, Am. St. Rep. 752, and cases in note, 759.

ingly, a mere transfer of the certificates representing shares which, either by charter or statute, are declared to be transferable only on the company's books, is ineffectual to pass the property as against attaching creditors of the transferrer having no notice thereof.¹ So, of course, it follows that an attach-

¹ *Buttrick v. Nashua &c. R. Co.*, (1882) 62 N. H. 313; s. c. 13 Am. St. Rep. 578; *Pinkerton v. Manchester &c. R. Co.*, 42 N. H. 454; *Scripture v. Francistown Soapstone Co.*, 50 N. H. 571, 585-589; *Fisher v. Essex Bank*, 5 Gray, 373; *Blanchard v. Dedham Gas L. Co.*, 12 Gray, 213; *Shipman v. Ætna Ins. Co.*, 29 Conn. 245, 253; *Johnston v. Luffin*, 103 U. S. 804; *Skowhegan Bank v. Cutler*, 49 Me. 315; *Fiske v. Carr*, 20 Me. 301; *Dutton v. Connecticut Bank*, 13 Conn. 493; *Oxford Turnpike Co. v. Bunnell*, 6 Conn. 552; *State v. First National Bank*, 89 Ind. 302; *Coleman v. Spencer*, 5 Blackf. (Ind.) 197; *Farmers' Gold Bank v. Wilson*, (1882) 58 Cal. 600; *Naglee v. Pacific Wharf Co.*, 20 Cal. 529; *Strout v. Natoma &c. Co.*, 9 Cal. 78; *Weston v. Bear River &c. Co.*, 5 Cal. 186; s. c. 63 Am. Dec. 117; *People's Bank v. Gridley*, 91 Ill. 457; *In re Murphy*, 51 Wis. 519. But see *Colt v. Ives*, 31 Conn. 25; s. c. 81 Am. Dec. 161. Under Mass. Stat. of 1870, ch. 224, providing that shares might be transferred by an instrument to be recorded in the corporation book, and that the transferee on producing the instrument and delivering up the certificate should be entitled to a new one, the shares might be attached in a suit against the assignor before these things were done. *Central Bank v. Williston*, 138 Mass. 244. B. transferred on the books of a corporation his shares to G. as collateral security. Afterwards, the necessity for the security being at an end, G., at B.'s request, indorsed and transferred the certificate to D., a

creditor of B. Before any record of this transfer had been made on the corporate books, another creditor of B. attached the shares as B.'s property, and it was held that the attachment could not be maintained. *Beckwith v. Burrough*, 13 R. I. 294. Code Ala. 1876, § 2041, provides that the shares of stock of any person in an incorporated company are personal property and transferable on the company's books as the company may prescribe, and may be levied on by attachment and execution and sold as goods and chattels. Section 2043 provides that no transfer of stock on the books shall be valid as against "*bona fide* creditors and subsequent purchasers, without notice," except from the time that the transfer shall have been made on the company's books. Section 2044 provides that persons holding stock not so transferred must have the transfer made on the books of the company, or, upon failing to do so within fifteen days, the transfer shall be void as to *bona fide* creditors or subsequent purchasers without notice. Under these provisions it is held that an attaching creditor who perfects his lien by the recovery of a judgment, is a *bona fide* creditor from the inception of his lien; and that where the purchaser of stock fails to have it transferred on the company's books within fifteen days, the stock becomes liable to attachment at the suit of any creditor of the person in whose name it stood on the books. *Berney Nat. Bank v. Pinckard*, (1889) 87 Ala. 577; s. c. 6 Ry. & Corp. L. J. 329. In this case

ment of shares of stock takes precedence over a sale thereof previously negotiated but not consummated by delivery until after attachment. Accordingly, where the sale of shares of stock has been negotiated between non-residents, but, before the purchase price has been paid or the certificates assigned and delivered to the intended purchaser, an attachment has been levied on them in an equity suit against the owner, in which this particular stock is described, the intended purchaser acquires no title as against a purchaser at the attachment sale, although the owner and intended purchaser have no actual notice of the attachment bill at the time of the attempted sale.¹ Where an attachment can not be levied on corporate stock by reason of its having been previously transferred,

Stone, C. J., after reviewing cases decided under the statute concerning registration of deeds and patents, continued: "Cases have been before us in which controversies have arisen between parties claiming to be transferees of stock in corporations and creditors of the transferers. The following are some of the cases: Nabring v. Bank, 58 Ala. 204, in which the transfer had been made on the books of the company. No question arose in that case which is material to the present one. Jones v. Latham, 70 Ala. 164, was the case of a creditor having an execution followed by a levy on the stock. We held that the bill was imperfect for the want of necessary averments.

. . . We feel constrained to construe the foregoing provisions — *First*, as placing stocks in private corporations on the same footing as other personal chattels as to their amenability to levy either under execution or attachment; *second*, that if a transfer of such stock is not recorded within fifteen days after the transfer, then such transfer is void as to *bona fide* creditors or subsequent purchasers without notice; and, *third*, that a judgment creditor having a lien, or an attaching cred-

itor who perfects his lien by the recovery of judgment, is each a *bona fide* creditor from the inception of the lien. The question as to priority of lien was settled as we have declared it in *Hardaway v. Semmes*, 38 Ala. 657. See also *Jordan v. Mead*, 12 Ala. 247; *Application of Thomas Murphy*, 51 Wis. 519; *Weston v. Mining Co.*, 5 Cal. 186; *Fisher v. Jones*, 82 Ala. 117. We place our ruling above on the language of the statute, which, as we interpret it, accords equal efficacy to attachment levy as it does to levy under execution. But a plaintiff in attachment levied does not thereby become a purchaser, (*Wollner v. Lehman*, 85 Ala. 273) and can assert no claim as such. We have ruled above that, under our statutes, *Pinckard, De Bardelaben & Co.* were allowed fifteen days after their purchase of the stock within which to have it transferred on the corporation books, and that failing to do so within that time, the stock became liable to levy under execution or attachment at the suit of any creditor of *Davin*, in whose name the stock stood on the books."

¹*Young v. South Tredegar Iron Co.*, (1887) 85 Tenn. 189; s. c. 4 Am. St. Rep. 752.

a bill can not lie to protect the lien of such an attachment by enjoining the payment of dividends to the holder; and the injunction, if granted, can be vacated by *mandamus*.¹ The rule above stated has been applied where only the by-laws of the company make the provision as to registration.²

§ 635. The same subject continued.—In the United States two rules prevail with reference to the effect of an unregistered transfer of stock upon the rights of the creditors of the transferrer, when the statute provides that the transfer shall only be effective as between the parties until it is registered.³ The English rule, which is also followed in several States, is as stated in the foregoing section. In New York, on the other hand, where the courts do all in their power to facilitate the transfer of stock, a *bona fide* sale, with written assignment and delivery of the certificates and power of transfer on the books, conveys the title to the stock free from liability to the creditors or the assignee in insolvency of the vendor.⁴ The New York rule is followed in Pennsylvania, and in several other States,⁵ and also by

¹ Van Norman v. Jackson Circuit Judge, 45 Mich. 204.

² Dutton v. Connecticut Bank, 13 Conn. 493. *Contra*, Boston Music Hall v. Cory, 129 Mass. 434; Sargent v. Essex & c. Ry. Co., 26 Mass. 202.

³ *In re* Murphy, 51 Wis. 519; Weston v. Bear River & c. Co., 5 Cal. 186; s. c. 63 Am. Dec. 117. See also Fisher v. Essex Bank, 71 Mass. 373; Newall v. Williston, 138 Mass. 240; Central Bank v. Williston, 138 Mass. 244.

⁴ Taylor on Corporations, § 796, citing Smith v. American Coal Co., 7 Lans. 317; Comeau v. Guild Farm Oil Co., 3 Daly, 218.

⁵ United States v. Vaughn, 3 Binn. 294; s. c. 5 Am. Dec. 375; Telford & c. Turnpike Co. v. Gerhab, (Pa. 1888) 13 Atlan. Rep. 90; Eby v. Guest, 94 Pa. St. 160; Fenney's Appeal, 59 Pa. St. 398; Commonwealth v. Watmouth, 6 Whart. 117; Broadway Bank v. McElrath, 13 N. J. Eq. 24;

s. c. *sub nom.* Hunterdon Bank v. Nassau Bank, 17 N. J. Eq. 496; Rogers v. Stevens, 8 N. J. Eq. 167; Cornick v. Richards, 3 Lea, 1. But see State Ins. Co. v. Sax, 2 Tenn. Ch. 507; Merchants' Nat. Bank v. Richards, 74 Mo. 77, affirming s. c. 6 Mo. App. 454; Seligson v. Brown, 61 Tex. 114; Newberry v. Detroit & c. Co., 17 Mich. 141; Beckwith v. Burroughs, 18 R. I. 294; Fraser v. Charleston, 11 S. C. 486, 519; Thurber v. Crump, (1888) 86 Ky. 408; Pitot v. Johnson, 33 La. Ann. 1286; Smith v. Crescent City & c. Co., 30 La. Ann. 1378. In Louisiana it has been held that a pledge of corporate stock is validly effected so far as the pledgor's creditors are concerned by the delivery of the certificates without notice to the corporation or transfer on its books, although the certificates refer to the charter, which contains a provision that no sale or transfer shall be made without first giving the

the federal courts,¹ which apply it even in States where the opposite prevails.² In some States this rule has been embodied in legislative enactments. Thus in Maryland an act provides that the rights of a pledgee acquired previous to a levy of attachment or garnishment shall not be affected by such a levy, nor shall the pledgee or corporation be prevented from registering a transfer;³ so also in Massachusetts, where the other rule originated.⁴ A debtor can not, however, as against an attaching creditor, where notice of the attachment has been served on the corporation, assign to another creditor more stock than will leave him sufficient to secure the debt.⁵

§ 636. (d) By creditors having knowledge of the transfer.

The legal title is not, however, subject to attachment by creditors having knowledge that the equitable title is in another party and who are not misled or deceived by the registration book.⁶ This principle would seem to be carried so far in Pennsylvania as to impute the assignor's knowledge to his attaching creditors.⁷ When the company itself attaches the

corporation sixty days' notice, with the privilege to it or its members to purchase on equal terms. *Crescent City Seltzer & Mineral Water M. Co. v. Deblieux*, (1888) 40 La. Ann. 155.

¹ *Continental National Bank v. Eliot National Bank*, 5 Fed. Rep. 369.

² *Scott v. Pequonnock National Bank*, 13 Fed. Rep. 494. But see *Williams v. Mechanics' Bank*, 5 Blatchf. 59. And see *Hazard v. Exchange Bank*, 26 Fed. Rep. 94, where certain shares of a corporation were transferred, but no record thereof was made as the by-laws required, and a creditor of the transferor, with no notice of the transfer, and in good faith, attached the shares and had them sold and transferred to a third party. It was held that a suit against the corporation for refusing to record the transfer to him could not be maintained by the former transferee.

³ Md. Act of 1886, ch. 287; *Morton v. Grafflin*, (1888) 68 Md. 545.

⁴ Mass. Act of May 9, 1884.

⁵ *Kyle v. Montgomery*, 73 Ga. 337.

⁶ *Mowry v. Hawkins*, (Conn. 1890) 18 Atl. Rep. 784; *Bridgewater Iron Co. v. Lissbeyer*, 116 U. S. 8, appealed from Massachusetts. But under Mass. Pub. Stat. ch. 105, § 24, which provides that an assignment of stock, until recorded, or a new certificate issued, shall not affect the right of the assignor's creditor to attach, it has been held that where the owner of stock transferred his certificate to a transferee who wrote to the corporation requesting a transfer, and a minute was made on the certificate-stub in the book of the corporation, the company having no transfer book, the transferor's creditor attaching the stock, with notice of the facts, could hold it. *Newell v. Williston*, 138 Mass. 240.

⁷ Pennsylvania Act of June 2, 1874, relating to limited partnership associations, prescribes a particular form

shares of one of its members, it is not chargeable with knowledge of a transfer thereof possessed by one of its directors who took no part in causing the attachment to be made and who had no knowledge of it.¹

§ 637. (e) By creditors of the transferee.— Ordinarily the creditors of an unregistered transferee of stock certificates can not subject his interest in the shares to execution and attachment.² For until his name has been entered as holder of the shares upon the books of the company, he has only an

for the transfer of stock, and declares that no change of ownership can be accomplished in any other mode or form, or by any other means than a transfer as specified, and it was held, that, notwithstanding, an assignment in another form passed the title as against the assignor, and therefore, as against his attaching creditor. *Tide Water Pipe Co. v. Kitchenman*, 103 Pa. St. 630.

¹ *Buttrick v. Nashua & C. R. Co.*, (1882) 62 N. H. 413; s. c. 13 Am. St. Rep. 578. For, since directors can act only as a board, their power being joint and not several, notice to one of them is not notice to the corporation. *Buttrick v. Nashua & C. R. Co.*, (1882) 62 N. H. 413; s. c. 13 Am. St. Rep. 578, 581, citing *Washington Bank v. Lewis*, 22 Pick. 24, 31; *Commercial Bank v. Cunningham*, 24 Pick. 270, 276; s. c. 35 Am. Dec. 322; *Atlantic State Bank v. Savery*, 82 N. Y. 291; *New Haven & C. R. Co. v. Chatham*, 42 Conn. 465, 480.

² *Lippitt v. American Wood Paper Co.*, (1885) 15 R. I. 141; s. c. 2 Am. St. Rep. 886. Executions and attachments can not be levied on shares of corporation stock if the debtor is not himself the legal possessor of the interest, or where he has only an equitable right, or has regularly assigned his interest. *Van Norman v. Jackson* Circuit Judge, 45 Mich. 204.

The provisions of the Pennsylvania Act of June 16, 1836, § 32, requiring the plaintiff issuing an attachment execution against stock held in a name other than that of defendant, to file an affidavit and enter into a recognizance, were intended to apply only to those cases where there is a claimant disputing the defendant's title, and not to those cases where the defendant's title is conceded. *Betts v. Towanda Gas & Water Co.*, 97 Pa. St. 367. In another Pennsylvania case an attachment issued against stock of a building association, standing in the name of defendant, but which had been assigned to the association as collateral security; no affidavit or recognizance was filed, as required by Pennsylvania Act of 1836. A third party intervened and claimed the stock, but he likewise did not file the affidavit and recognizance. At his instance the writ was quashed, and it was held, that the writ had been improperly issued, and that while the claim of the intervening party was not made in conformity with the requirements of the act, yet the attachment being improper, the decree of the court below, refusing to allow the plaintiff in the first case to file the affidavit and recognizance, must be affirmed. *Eby v. Guest*, 94 Pa. St. 160.

equitable right to them as between himself and his transferrer, or those claiming under the latter with notice.¹ At common law an equitable right or interest in personal property is not attachable.² It is natural to suppose that the intention of statutes subjecting corporate stock to attachment and levy, is simply to put it on a par with other personal property.³ This view accords with the language of the statutes. It is "the shares of the defendant," or his "stock or shares," and not his right or interest in the stock or shares, which in the words of these acts may be attached or levied upon.⁴ Where, however, the wording of the statute is broad, in terms subjecting the stockholder's "rights" or "interest" to execution and attachment, equitable rights are held to be included.⁵

¹ *Vide supra*, § 634.

² *Lippitt v. American Wood Paper Co.*, (1885) 15 R. I. 141; s. c. 2 Am. St. Rep. 886, citing Freeman on Executions, § 116.

³ *Lippitt v. American Wood Paper Co.*, (1885) 15 R. I. 141.

⁴ *Lippitt v. American Wood Paper Co.*, (1885) 15 R. I. 141, construing R. I. Gen. Stat. ch. 196, § 21; ch. 197, § 9; ch. 212, §§ 18-20; R. I. Pub. Stat. ch. 207, § 22; ch. 208, § 9; ch. 223, §§ 20-22. *Cf. Weller v. Pace Tobacco Co.*, (1888) 2 N. Y. Supl. 292 declaring that N. Y. Code Civ. Proc. § 647, providing that shares of stock may be levied on, is applicable only where the defendant has the legal title to the stock, and not to a case where the defendant has, in another State of which he was a resident, assigned the certificates, although no transfer has been made on the company's books.

⁵ *Middletown Savings Bank v. Jarvis*, 33 Conn. 372, construing Conn. Gen. Stat. ch. 2, § 19; ch. 14, § 237. Under Dakota Code Civil Proc. § 314, providing that all goods, chattels, money, and other property, "or any interest therein," and all other property "not capable of man-

ual delivery," shall be liable to execution, the interest of a pledgor in stock of a corporation "in pool," which has been transferred to the trustee of "the pool" by indorsement only, may be seized and sold under execution. *Van Cise v. Merchants' Nat. Bank*, (1887) 33 N. W. Rep. 897. Wyoming Rev. Stat. § 2774, provides that a levy upon the interest of the legal or equitable owner of corporate stocks shall be made in a particular way. In an action by the assignee of a certificate of stock, to compel the corporation to make the proper transfer on its books, the answer alleged that on a certain date one B. obtained a judgment against the husband of the assignor, "who held said certificate of stock in trust for and to the use of her said husband, and on the 19th day of December, 1887, execution was issued on said judgment, and on the 6th day of February, 1888, the sheriff of Laramie county, Wyoming territory, levied said execution upon said shares of stock as the property of said husband, and that defendant had no notice of the assignment to plaintiff. It was held that the answer was demurrable, in that it did

§ 638. **Pledge and mortgage distinguished.**—Pledge is the common method at present of securing an indebtedness by stock; formerly, however, it was accomplished by mortgage in which the pledgor retained possession of the stock.¹ But it has recently been held that a mortgage of shares of corporate stock, although land is also included in the mortgage, is valid and binding between the parties, without delivery of possession of the certificate of stock.² In Kentucky a conveyance of shares in a corporation is not within the recording acts, and a record of a mortgage of shares does not charge with constructive notice.³

§ 639. **The pledgee's rights**—(a) **In general.**—It may now be considered as established, that shares of stock may be pledged; and that this can be effected by any valid contract between the parties, either written or oral.⁴ The pledgee of

not allege that the judgment debtor was the equitable owner of the stock at the date of the levy, nor that the sheriff of Laramie county was the proper officer to execute the writ, nor how the levy was made. *Wyoming Fair Assoc. v. Talbott*, (Wyoming, 1889) 21 Pacif. Rep. 700. See further as to attachment of equitable interest, *Foster v. Potter* 37 Mo. 525; *Thacker v. Chambers*, 5 Humph. 313; s. c. 42 Am. Dec. 431, and note, 432; *Reed v. Upton*, 10 Pick. 522; s. c. 20 Am. Dec. 545, and note, 547; *Badlam v. Tucker*, 1 Pick. 389; s. c. 11 Am. Dec. 202.

¹ *Mechanics' &c. Assoc. v. Conover*, 14 N. J. Eq. 219. *Cf.* *Wilson v. Little*, 2 N. Y. 443; s. c. 51 Am. Dec. 307; *Huntington v. Mather*, 2 Barb. 538; *Hasbrauk v. Vandervoort*, 4 Sand. 74; *Williamson v. New Jersey &c. R. Co.*, 26 N. J. Eq. 398.

² *Tregear v. Etiwanda Water Co.*, (1888) 76 Cal. 537; s. c. 9 Am. St. Rep. 245. In an action against a corporation to compel the execution and delivery of a certificate of certain shares of stock which stand on the books

of the company in the name of another, from whom plaintiff claims title under a mortgage and sheriff's deed in foreclosure proceedings, the mortgagor is not a necessary party. And the complaint in such an action is not unintelligible for the reason that the writ issued in the foreclosure proceedings, (under Code Civil Proc. Cal. § 684, which requires that the writ shall recite the judgment or the material parts thereof, and direct the officer to make the sale for its enforcement,) is termed "an order of sale." *Tregear v. Etiwanda Water Co.*, (1888) 76 Cal. 537; s. c. 9 Am. St. Rep. 245.

³ *Spalding v. Paine*. 81 Ky. (1868).

⁴ *McMahon v. Macy*, 51 N. Y. 155; *Wilson v. Little*, 2 N. Y. 443; *Mount Holly &c. Co. v. Ferree*, 17 N. J. Eq. 117; *Broadway Bank v. McElrath*, 13 N. J. Eq. 24; *Fenney's Appeal*, 59 Pa. St. 398; *Ginz v. Stumph*, 73 Ind. 209; *Baldwin v. Canfield*, 26 Minn. 43; *Burgess v. Seligman*, 107 U. S. 20; *Brick v. Brick*, 98 U. S. 514; *Continental National Bank v. Eliot National Bank*, 12 Fed. Rep. 35;

stock can retain it, till the debt is satisfied, although during such time he can not by holding adversely acquire title under the Statute of Limitations.¹ While as a general rule it is said that a pledgee of stock can not alienate it,² yet, in the absence of a specific agreement to the contrary, he may trans-

Merchants' National Bank v. Richards, 74 Mo. 77; *Pitot v. Johnson*, 33 La. Ann. 1286; *Blouin v. Liquidators*, 30 La. Ann. 714; *Newton v. Fay*, 92 Mass. 505; *Pinkerton v. Railroad Co.*, 42 N. H. 424; *New Orleans National Banking Assoc. v. Wiltz*, 10 Fed. Rep. 330; *Van Blarcom v. Broadway Bank*, 9 Bosw. 532; *Cornick v. Richards*, 3 Lea, 1.

¹ *Cross v. Eureka Lake & Yuba Canal Co.*, (1887) 73 Cal. 302; s. c. 2 Am. St. Rep. 808. In a recent case in New York, the fiscal agent of a railroad company negotiated a loan from defendant, to be secured by a mortgage on the corporate property. Pending the execution of the mortgage, certain certificates of stock in a coal company, issued in the names of plaintiffs, and which plaintiffs claimed to own, were delivered to defendant as temporary security, with the consent of plaintiffs. A power of attorney, executed in blank, was indorsed on each certificate. Afterwards the stock certificates were handed back to the agent of the railroad company, on the delivery to defendant of the mortgage. Thereafter, the stockholders of the railroad company having refused to ratify the mortgage, defendant caused it to be canceled at the request of the railroad company, and obtained from the agent a return of the stock certificates. In the mean time the railroad company had passed a resolution to the effect that it was not the owner of the certificates, and that they should be delivered to the president of the coal

company. But the resolution did not state who the owners of the stock were, and it did not appear that the defendant had any notice that the shares were claimed by plaintiffs; and it was held that the defendant was entitled to recover possession of the certificates. *Wing v. Holland Trust Co.*, (1889) 5 N. Y. Supl. 384. In a federal Supreme Court case one K., who owned all the stock of an association, and who used its land as his individual property, agreed to sell the stock to plaintiff, and procure a deed to him of the land. The plaintiff, thinking his deed sufficient, failed to demand the stock, which was held by defendant bank as collateral, which bank had been informed of the agreement by K. The State court having decreed the stock to be plaintiff's subject to the bank's interest, the bank sold it to J. for the amount due on the obligation for which it was collateral. J. sold nine-tenths of the stock, and this passed, in the course of many transfers, to S. & L., who were made defendants in this cause, and who held as trustees. These trustees, and all through whom they held, had knowledge of plaintiff's rights. It was decided that the plaintiff was entitled to the stock, subject to the payment of the amount for which it was originally sold by the bank as pledgee. *Minneapolis Agricultural & Mechanical Assoc. v. Canfield*, (1887) 121 U. S. 295.

² *Fay v. Gray*, 124 Mass. 500; *Goss v. Hampton*, 16 Nev. 185; *France v. Clark*, 22 Ch. Div. 380.

fer the stock to his own name on the books of the company, and, when so transferred, he is not bound to return the identical shares.¹ He may make any use of them which will not defeat the pledgor's ultimate rights.² Accordingly, where the stock is delivered upon pledge with a power of transfer, a *bona fide* purchaser for value is relieved from liability to the pledgor.³ A person taking in pledge a certificate of stock newly issued in his name by an officer of a corporation, as security for the private debt of the officer, is, however, required to investigate the title to the stock, and is affected with notice of whatever he might have found out if he had made proper inquiry, where the officer is one having the power, either alone or with others, to issue stock certificates.⁴ The rights of the holder of a certificate of stock are held to be superior to those of a person to whom the stock has been transferred without the possession of the certificate therefor.⁵

§ 640. (b) To registration.—Unless the contract between the pledgor and pledgee forbid, the latter may have himself or any one nominated by him registered as the holder of the stock upon the books of the company.⁶ By doing so he as-

¹ See note to *Hubbell v. Drexel*, 21 Am. L. Reg. 454.

² *Lawrence v. Maxwell*, 53 N. Y. 19; *Chamberlin v. Greenleaf*, 4 Abb. N. C. 178.

³ *Wood's Ry. Law*, § 99, citing *Felt v. Heye*, 23 How. Pr. 359; *McNeil v. Tenth National Bank*, 46 N. Y. 325; *Cherry v. Frost*, 7 Lea, 1; *Thompson v. Toland*, 48 Cal. 99; *Ex parte Sargent*, L. R. 17 Eq. 273. *Contra*, *Ortigosa v. Brown*, 47 L. J. Ch. 168.

⁴ *Farrington v. South Boston R. Co.*, (1890) 150 Mass. 406; s. c. 7 Ry. & Corp. L. J. 196.

⁵ *Beach on Railways*, § 330, citing *Maybin v. Kirby*, 4 Rich. Eq. 105. In *Van Cise v. Merchants' Nat. Bank*, (Dakota, 1887) 33 N. W. Rep. 897, certain stock of a mining corporation was "pooled." F., who was cashier of the D. bank, and also a

member of the firm of S., M. & F., was made the chief trustee of the combination. R., one of those who "pooled" the stock, was indebted to S., M. & F. At the time his stock was "pooled," he pledged it to them as collateral; the certificate, which was indorsed by R., remaining in possession of F. as trustee of the "pool." He subsequently pledged it, while still in "pool," to secure an indebtedness to the bank. It was held that both pledges were valid, under Civil Code Dak. § 1759, providing that "the lien of a pledge is dependent on possession, and no pledge is valid until the property pledged is delivered to the pledgee, or to a pledge-holder."

⁶ *Anderson v. Philadelphia Warehouse Co.*, 111 U. S. 479; *Heath v. Griswold*, 5 Fed. Rep. 573; *Horton v. Morgan*, 19 N. Y. 170; s. c. 75

sumes the responsibilities of a stockholder, because he has also taken the apparent ownership of the stock, including the right to receive dividends and vote at elections.¹ But even where the pledgee has not been registered, a purchaser of the pledged stock sold in execution of a judgment obtained against the pledgor will, if he knew that the stock had been hypothecated, have his rights postponed to those of the pledgee.²

§ 641. (c) **To receive dividends.**—Although as between pledgor and pledgee the title is in the former and the pledgee's lien is extinguished upon payment of the debt,³ yet the pledgee is entitled to receive dividends.⁴ He must account, however, therefor in the final adjustment of the transaction between him and his pledgor.⁵

§ 642. (d) **To vote.**—A pledgee of shares, having had himself registered as holder thereof on the company's books, is entitled to vote at corporate meetings.⁶ Where shares of stock are pledged as collateral, the pledgee reserving the right to sell in case of default, and the pledgee causes a transfer to himself to be recorded on the books of the corporation, until the pledgor's rights shall have been foreclosed by a sale, he, and not the pledgor, is entitled to vote on the stock, in the absence of a statute providing otherwise.⁷ The registered pledgee must exercise this right, however, with some regard to the pledgor's interests.⁸ Until the pledgee has been regis-

Am. Dec. 311; *Day v. Holmes*, 108 Mass. 306; *Hiatt v. Griswold*, 5 Fed. Rep. 373; *Union &c. Bank v. Farrington*, 13 Lea, 333; *Cornick v. Richards*, 3 Lea, 1; *Hubbell v. Drexel*, 21 Am. L. Reg. N. S. 452; *Fay v. Gray*, 124 Mass. 500; *In re Angelo*, 5 Dé Gex & S. 278.

¹ *National Bank v. Case*, 99 U. S. 628; *Poole v. West Point &c. Assoc.*, (1887) 30 Fed. Rep. 513.

² *Weston v. Bear River &c. Co.*, 6 Cal. 425; s. c. 5 Cal. 186.

³ *Cross v. Eureka Lake & Yuba Canal Co.*, (1887) 73 Cal. 302; s. c. 2 Am. St. Rep. 808, construing Cal. Civ. Code, § 2889, under which one

to whom a certificate of shares of corporate stock is issued as security for a debt does not, as against the pledgor, obtain the legal title to the stock.

⁴ *Hill v. Newichawanich Co.*, 48 How. Pr. 427; *Herrman v. Maxwell*, 47 N. Y. Super. Ct. Rep. 347.

⁵ *Hasbrouck v. Vandervoort*, 4 Sandf. 74; *Isaac v. Clarke*, 2 Bulst. 306; *Edwards on Bailments*, 300.

⁶ See generally the cases cited *supra*, § 69.

⁷ *State v. Smith*, (1887) 15 Oregon, 98.

⁸ *Ex parte Willcocks*, 7 Conn. 402, 410; s. c. 17 Am. Dec. 524; *Stephens*

tered, the pledgor retains the right to vote upon the stock at corporate meetings.¹

§ 643. Foreclosure of the pledge.—Where the contract of pledge has not been complied with and the stock not redeemed, the pledgee may sell the shares at public auction after giving notice to the pledgor.² He can not himself become the purchaser against the objection of the pledgor.³ It has been held, however, that an express agreement that the pledgee shall have the right to sell, authorizes him to do so by private sale.⁴ The more usual remedy of the pledgee is by a bill in equity to foreclose the right of redemption,⁵ especially when there has been no formal transfer of the certificates.⁶ If the pledgor redeems the stock before sale or fore-

on Joint Stock Companies, 401; Lawrence v. Maxwell, 53 N. Y. 19; Baldwin v. Canfield, 26 Minn. 43; Scholfield v. Union Bank, 2 Cranch, 115; McHenry v. Jewett, 90 N. Y. 58; Strong v. Smith, 15 Hun, 222; Vowell v. Thompson, 3 Cranch, 428; McDaniell v. Flower Brook Manuf. Co., 22 Vt. 274; Fanning v. Hibernia Ins. Co., 37 Ohio St. 339; Heath v. Silverthorn & Co. Mining Co., 39 Wis. 146.

¹ *Ex parte* Willcocks, 7 Cowen, 402; Hoppin v. Buffum, 9 R. I. 513; s. c. 11 Am. Rep. 291; Brewster v. Hartley, 37 Cal. 15; s. c. 99 Am. Dec. 237; Crease v. Babcock, 10 Metc. 525, 545; McDaniell v. Flower Brook Manuf. Co., 22 Vt. 274; *In re* Cecil, 36 How. Pr. 477; *In re* Barker, 6 Wend. 509; Vowell v. Thompson, 3 Cranch, 428; Scholfield v. Union Bank, 2 Cranch, 115; Smith v. American Coal Co., 7 Lans. 317; N. Y. Laws of 1848, ch. 40, § 17.

² Ogden v. Lathrop, 65 N. Y. 158; Markham v. Jaudon, 41 N. Y. 235, 243, holding, also, that the time and place must be reasonable; Conyngnam's Appeal, 57 Pa. St. 474; Lewis v. Graham, 4 Abb. Pr. 106, that

newspaper advertisement is not sufficient notice; Bryan v. Baldwin, 52 N. Y. 234, holding that the notice must be personal; Stevens v. Hurlbut Bank, 31 Conn. 146, holding that express power to sell in a certain event is not a waiver of notice. A sale upon the Stock Exchange is held not to be public. Willoughby v. Comstock, 3 Hill, 389; Brass v. Worth, 40 Barb. 648; Rankins v. McCullough, 12 Barb. 103. And a private sale of pledged stock, after default, is illegal. Willoughby v. Comstock, 3 Hill, 389; Castello v. City Bank, 1 Leg. Obs. 25. Any irregularity in the sale may be remedied by the conduct of the pledgor, which may be such as to estop him from future objection. Willoughby v. Comstock, 3 Hill, 389.

³ Maryland Fire Ins. Co. v. Dalrymple, 25 Md. 242; Bryan v. Baldwin, 52 N. Y. 232.

⁴ Bryson v. Raynor, 25 Md. 424.

⁵ Vaupell v. Woodward, 2 Sandf. Ch. 143.

⁶ Robinson v. Hurley, 11 Iowa, 410; s. c. 79 Am. Dec. 497; Merchants' Nat. Bank v. Hall, 83 N. Y. 338; Briggs v. Oliver, 68 N. Y. 336; John-

closure, he can not demand a return of the identical shares which he hypothecated, unless they can be distinguished from other stock of the same kind by ear-marks or some other means of identification.¹

§ 644. **The company's lien upon shares.**—At common law a corporation has no lien upon the stock of its members to secure debts due to it from them.² It may be created, however, by statute,³ or by usage and a known course of dealing,⁴ or by an agreement between the shareholders,⁵ or by a by-law of the company.⁶ In an early case in Pennsylvania there was no by-law of the banking company or written regulation of its board of directors giving a lien upon the stock, but the court held that a lien arose from the borrowing of money from the bank with knowledge of its usage in that regard, and said, "a course of dealing—a usage, an understanding, a contract express or implied—is the lien of the parties and a law to

son v. Dexter, 2 MacA. 530; Blouin v. Liquidators, 30 La. Ann. 714.

¹ See note to Hubbell v. Drexel, 21 Am. L. Reg. 454; Gilpin v. Howell, (1846) 5 Pa. St. 41; s. c. 45 Am. Dec. 720; Horton v. Morgan, (1859) 19 N. Y. 170; s. c. 75 Am. Dec. 811; Taylor v. Ketchum, 35 How. Pr. 289; Dykers v. Allen, 7 Hill, 497; Noyes v. Spaulding, (1855) 27 Vt. 420; Price v. Grover, 40 Md. 102; Thompson v. Toland, 48 Cal. 99; Atkins v. Gamble, 42 Cal. 86; Hardenburgh v. Bacon, 33 Cal. 356; Boylan v. Huguet, 8 Nev. 345; Langton v. Waite, L. R. 6 Eq. 165; Le Cray v. Eastman, 10 Modern (K. B.), 499.

² Neale v. Jenny, 2 Cranch, 188; Bates v. New York Ins. Co., 3 Johns. Cas. 238; Steamship Dock Co. v. Heron, 52 Pa. St. 280; Massachusetts Iron Co. v. Hooper, 7 Cush. 183; Dana v. Brown, 1 J. J. Marsh. 304; Byron v. Carter, 22 La. Ann. 98; People v. Crockett, 9 Cal. 112; Williams v. Lowe, 4 Neb. 382, 398; McMurrich v. Bond Head Harbour Co.,

9 U. C. Q. B. 333. For the general law of this subject, see Lawson's Rights and Remedies, § 465; Sargent v. Franklin Ins. Co., 8 Pick. 90; s. c. 19 Am. Dec. 306; Fitzhugh v. Bank of Shepardsville, 3 T. B. Mon. 126; s. c. 16 Am. Dec. 90.

³ *Vide infra*, § 645.

⁴ Morgan v. Bank of North America, 8 Serg. & R. 73, 88; s. c. 11 Am. Dec. 575.

⁵ Vansands v. Middlesex County Bank, 26 Conn. 144.

⁶ Bank of Holly Springs v. Pinson, 58 Miss. 421; s. c. 38 Am. Rep. 330; Mechanics' Bank v. Merchants' Bank, 45 Mo. 513; s. c. 100 Am. Dec. 388; Spurlock v. Pacific R. Co., 61 Mo. 319; Pendergast v. Bank of Stockton, 2 Sawy. 108; Knight v. Old National Bank, 3 Clifford, 429; *In re* Bachman, 12 Nat. Bankr. Reg. 223; McDowell v. Bank, 1 Harr. (Del.) 27; St. Louis & c. Ins. Co. v. Goodfellow, 9 Mo. 149; People v. Crockett, 9 Cal. 112; Child v. Hudson's Bay Co., 2 P. Wms. 207.

them, provided they are not repugnant to the charter or the laws of the land. . . . The bank had an undoubted right to say to any stockholder: 'We discount your note; but remember until it is paid we shall hold your stock in security. You shall not be permitted to transfer it until you pay us.'"¹ The lien of the corporation is only to secure it upon debts of the registered shareholder. It does not extend to the interest of an unregistered transferee for debts due from him to the company.² Failure to assert a lien established by custom or agreement, or created by by-law, may operate as a waiver thereof. But a charter or statutory lien, notice of which is embodied in the stock certificates, is not ordinarily waived by mere failure to assert it,³ unless the language of the statute which is construed to create a lien is to the effect that the shares shall not be transferred until the prior holder's indebtedness to the company has been paid; in which case the company waives its lien by permitting registration without previous payment; and the transferee thus registered obtains a complete and unincumbered title.⁴ If it appear that advances were made to the stockholder upon personal credit alone, or on some other security, without reference to the stock, this would constitute a waiver of the lien; but otherwise waiver is not to be lightly presumed.⁵ Merely taking additional security is not a waiver.⁶ In a recent case in California, it was held that a reorganization of a banking com-

¹ *Waln v. Bank of North America*, 8 Serg. & R. 89.

² *Helm v. Swiggett*, 12 Ind. 194.

³ *Reese v. Bank of Commerce*, 14 Md. 271; s. c. 74 Am. Dec. 536; *Hoffman & Co. v. Cumberland & Co.*, 16 Md. 456; s. c. 77 Am. Dec. 311; *McCready v. Rumsey*, 6 Duer, 574; *First National Bank v. Hartford & Co. Ins. Co.*, 45 Conn. 22. Cf. *National Bank v. Watertown Bank*, 105 U. S. 217; *In re Hoylake Ry. Co.*, L. R. 9 Ch. 257, 259.

⁴ *Cecil Bank v. Watertown Bank*, 105 U. S. 217; *Hill v. Paine River Bank*, 45 N. H. 300; *In re Hoylake Ry. Co.*, 9 Ch. 257; *In re Northern*

Assam Tea Co., L. R. 10 Eq. 458; *Higgs v. Assam Tea Co.*, L. R. 4 Ex. 387.

⁵ *Jennings v. Bank of California*, (1889) 79 Cal. 323; s. c. 12 Am. St. Rep. 145, 150, 151, where it was said that the facts that the bank's cashier testified that "if a party is in good standing, we don't question his right to a transfer," and that the stockholder was allowed a large overdraft, do not show that the loan was made on his personal credit alone, so as to waive the lien on the stock. Cf. *Union Bank v. Laird*, 2 Wheat. 390.

⁶ *Union Bank v. Laird*, 2 Wheat. 390.

pany, and the adoption of by-laws providing that certificates of stock "shall be transferable by indorsement and delivery thereof, the transfer to be complete and binding upon the bank only when recorded upon the books of the bank," is not a waiver of the stipulation in the certificate or of the lien created thereby.¹ A waiver as to part of the shares is not a waiver as to all.²

§ 645. Statutory and charter liens.—In England and in many of the American States, corporations have a statutory lien upon the stock of their shareholders for debts due from them to the company,³ which, unless especially restricted to a certain class of debts, extends to all debts owing from the shareholder to the corporation,⁴ in whatever capacity, it has been said, he may hold the shares.⁵ Especially does the lien

¹ *Jennings v. Bank of California*, (1889) 79 Cal. 323; s. c. 12 Am. St. Rep. 145, 149.

² *First National Bank v. Hartford Ins. Co.*, 45 Conn. 22. *Contra*, *Presbyterian Congregation v. Carlisle Bank*, 5 Pa. St. 345.

³ *E. g.* Va. Code of 1860, ch. 57, §§ 21, 22, 24; Wis. Rev. Stat. § 1751; Pa. General Railroad Law of 1849; Oregon Miscel. Laws, ch. 32, § 3230; The Companies Clauses Act of 1845, 8 Vic. ch. 16, § 16. The New York "Stock Corporation Law" of 1890 enacts that no share shall be transferable until all previous calls thereon shall have been fully paid in. N. Y. Laws of 1890, ch. 564, § 40. There was a similar provision in the General Railroad Law of 1850, ch. 140, § 8. See also N. Y. Laws of 1881, ch. 468, § 12; *National Bank v. Watsontown Bank*, 105 U. S. 217; *Allen v. Montgomery R. Co.*, 11 Ala. 437, 451; *Pittsburg & c. R. Co. v. Clarke*, 29 Pa. St. 146; *Everhart v. West Chester R. Co.*, 28 Pa. St. 339; *Rogers v. Huntington Bank*, 12 Serg. & R. 77; *Ryder v. Alton & c. R. Co.*, 13 Ill. 516; *Gaff v. Flesher*, 33 Ohio

St. 107. All railroad companies incorporated in Pennsylvania under special acts are subject to the General Railroad Law of February 19, 1849, unless their charters contain provisions inconsistent with those of the general law. Where, therefore, a stockholder in a company, organized under a special act, transferred his shares while indebted to the company, it was held that the company had a lien on the shares to the amount of the indebtedness. *Mount Holly Paper Co.'s Appeal*, 99 Pa. St. 513. Although the statute or charter only specifies "shares and stock," the lien extends to dividends also. *Sargent v. Franklin Ins. Co.*, 8 Pick. 90; s. c. 19 Am. Dec. 306; *Stebbins v. Phoenix Fire Ins. Co.*, 3 Paige, 350; *Bates v. New York Ins. Co.*, 3 Johns. Cas. 238; *Grank v. Mechanics' Bank*, 13 Serg. & R. 140; *Hague v. Dander-son*, 2 Ex. 147.

⁴ *Taylor on Corporations*, § 604.

⁵ In England it has been said that under the Companies Act of 1862, when a company was by its articles of association entitled to a lien upon the shares of a shareholder for all

extend to unpaid calls on the original subscription,¹ and to all of the shares for balances due on other shares.² But if the statute gives the company no lien for any other debts of the stockholder than for unpaid shares, one who indorses a note given for a subscription is entitled to have the stock applied to pay the debt for the unpaid subscription, in preference to the other debts due from his principal to the company, even though one of its by-laws provides that the interest of any stockholder shall be liable for the payment of all debts which may be due from him to the company, and that if there is more than one debt, the board of directors may prescribe which one shall be paid out of the debtor's stock. The by-law can only apply to the interest of the debtor stockholder in the stock after the lien of the stock debt is satisfied.³ Ordinarily the lien can be enforced for the benefit of the corporation only.⁴ But a surety, as, for example, an indorser of a note given in payment of a subscription, is entitled to be subrogated to the company's rights against his principal.⁵ A lien created by

debts owing by him to the company, the lien attached even to shares held by a trustee and had priority as against the *cestui que trust*. *Browne & Theobald's Ry. Law*, 75, citing *New London &c. Bank v. Brocklebank*, 21 Ch. Div. 302. But a conveyance in trust to sell to any one agreeing to assume the subscriber's indebtedness to the company, does not render the trustee liable as a purchaser within the meaning of the statute of Oregon. *Powell v. Willamette Valley R. Co.*, 15 Oregon, 393; construing Oregon Miscel. Laws, ch. 32, § 3230.

¹ *Pittsburgh &c. R. Co. v. Clarke*, 29 Pa. St. 146; *Spurlock v. Pacific R. Co.*, 61 Mo. 319; *Shaw v. Rowley*, 5 Eng. Ry. & Canal Cas. 47. Cf. *Newry &c. Ry. Co. v. Edmunds*, 2 Ex. 118; *Ambergate &c. Ry. Co. v. Mitchell*, 4 Ex. 540; *Great North &c. Ry. Co. v. Biddulph*, 7 Mees. & W. 243. But not to the unpaid balance on his subscription which has not

been called. *Hall v. United States Ins. Co.*, 5 Gill, (Md.) 484; *Kahn v. Bank*, 70 Mo. 262. See, however, *In re Bachman*, 12 Nat. Bankr. Reg. 223.

² *Stebbins v. Phoenix Fire Ins. Co.*, 3 Paige, 350; 8 Vic. ch. 16, § 16. *Contra*: Only to those shares upon which the call is made. *Shenandoah Valley R. Co. v. Griffith*, 76 Va. 913; *Hubbersty v. Manchester &c. Ry. Co.*, L. R. 2 Q. B. 471.

³ *Petersburg Saving & Ins. Co. v. Lumsden*, 75 Va. 327.

⁴ *Bank of Utica v. Smalley*, 2 Cowen, 770; s. c. 14 Am. Dec. 526; *Crescent City &c. Co. v. Deblieux*, (1888) 40 La. Ann. 155; *Cross v. Phoenix Bank*, 1 R. I. 39; *White's Bank v. Toledo &c. Ins. Co.*, 12 Ohio St. 601. But see *Kuhns v. Westmoreland Bank*, 2 Watts, 136.

⁵ *Petersburg Saving & Ins. Co. v. Lumsden*, 75 Va. 327. In this case a by-law of a corporation organized subject to the provisions of the Vir-

the company's charter is of equal force with one created by statute, all persons being affected with knowledge thereof whether it be referred to on the certificates or not.¹ The statutory lien is binding as to the creditors and assignees in insolvency of the shareholder and also as to persons who purchase shares from prior holders or take them as collateral security;² for all persons are presumed to know the law and are affected with notice of a statutory or charter lien, whether they have actual knowledge of it or not.³

§ 646. Distinction between statutory and other liens.—

There is this distinction, however, between a lien created by charter or statute and one created in any other way, to wit, that all persons are affected with notice of the former;⁴ whereas there is no such presumption in respect to a lien established by custom, agreement or by-law.⁵ A transfer of shares to a *bona fide* purchaser for value, vests the title between the seller and the corporation free of equities of which

ginia Code of 1860, ch. 57, §§ 21, 22, 24, required each stockholder to give his note, satisfactorily indorsed, for his unpaid stock. By the code the stock of each stockholder is subject to a lien for the unpaid balance due on his shares; and it was held that on the failure of one of the stockholders to pay his note, the indorser was entitled to have the stock applied to his relief. And see *Klopp v. Lebanon Bank*, 46 Pa. St. 88; *West Branch Bank v. Armstrong*, 40 Pa. St. 278; *Hardcastle v. Commercial Bank*, 1 Harr. (Del.) 374, n.; *Hodges v. Planters' Bank*, 7 Gill & J. 306, 310; *Young v. Mough*, 23 N. J. Eq. 325.

¹ *Beach on Railways*, § 389; *Leggett v. Bank of Sing Sing*, 24 N. Y. 288; *German Security Bank v. Jefferson*, 10 Bush, 326; *Bradford Banking Co. v. Briggs*, 31 Ch. Div. 149; reversing s. c. 29 Ch. Div. 119. *Vide infra*, § 646.

² *Beach on Railways*, § 391, citing

Norton v. Norton, 43 Ohio St. 509, and *Taylor on Corporations*, § 603.

³ *Bank of Utica v. Smalley*, 2 Cowen, 770; s. c. 14 Am. Dec. 526; *McCready v. Rumsey*, 6 Duer, 594; *Union Bank v. Laird*, 2 Wheat. 390; *Bishop v. Globe Co.*, 135 Mass. 132; *St. Louis &c. Ins. Co. v. Goodfellow*, 9 Mo. 149; *Bohmer v. City Bank*, 77 Va. 445; *Grant v. Mechanics' Bank*, 15 Serg. & R. 140; *Downer v. Zanesville Bank*, Wright, (Ohio) 477. In Louisiana a pledge of shares of stock in a corporation is valid by the delivery of the certificate, although the pledgor is indebted to the corporation, and its charter prohibits transfers under such circumstances. Shares of stock are not "credits" within the meaning of the Louisiana Code, art. 3158. *Pitot v. Johnson*, 33 La. Ann. 1286.

⁴ *Vide supra*, § 645. *Cf. Hammond v. Hastings*, (1890) 134 U. S. 401.

⁵ As to the force of by-laws creating a lien, *vide supra*, § 322, p. 523.

the purchaser was ignorant, although provided for by a by-law of the corporation.¹ Accordingly, it is customary, where there is no charter or statutory lien, to embody in the certificates representing the shares a notice that the company will not permit registration of a transfer of the stock until payment of all indebtedness due to it from the shareholder. This notice may be embodied in the certificate whether there is any by-law so prescribing or not, notwithstanding that the terms on which stock may be transferred are prescribed by statute.² And when the stockholder accepts a certificate containing such a condition without objection, and thereafter borrows money from the corporation, he assents to the condition, and the company has an equitable lien on the stock for the amount due it.³ In a Connecticut case in point the shareholder brought suit for damages against a banking company for refusing to transfer his shares. No lien was given the bank, either by its by-laws or by charter or by statute. The stock certificates, however, contained a condition to the effect that the transfer upon the bonds should be subject to the indebtedness of the stockholder; and the court held that the acceptance of the certificate without objection and a subsequent loan by means of the discount of a note, effected a contract which created an equitable lien for the amount of the indebtedness.⁴ The fact that the condition is inserted in the certificate by the president, cashier, and secretary of the bank, without authority of the board of directors, is immaterial as against the borrower, as these officers will be presumed to have authority to arrange the terms of the loan.⁵ The fact that there was no usage from which such a lien could arise is no defense to its enforcement, where it does not

¹ *Anglo-Californian Bank v. Grangers' Bank*, 63 Cal. 359.

² *Jennings v. Bank of California*, (1889) 79 Cal. 323; s. c. 12 Am. St. Rep. 145.

³ *Jennings v. Bank of California*, (1889) 79 Cal. 323; s. c. 12 Am. St. Rep. 145, 148.

⁴ *Vansands v. Middlesex Bank*, 26 Conn. 144.

⁵ *Jennings v. Bank of California*,

(1889) 79 Cal. 323; s. c. 12 Am. St. Rep. 145, 149, where the court said:

"The officers who transact the ordinary business of a corporation are presumed to have authority to do all acts which are usual and incidental thereto. *McKiernan v. Lenzen*, 56 Cal. 63, 64; *Donnell v. Lewis County Bank*, 80 Mo. 171; *Reynolds v. Collins*, 78 Ala. 97; *Case v. Citizens' Bank*, 100 U. S. 455."

appear that there was any usage against it.¹ An assignee of the certificates of shares which are transferable only on the books of the company takes not the legal title but a mere equity which must yield to the superior equity of the company's lien.² And at any rate, the condition respecting the lien usually contained in the certificates themselves, is sufficient to put the assignee upon inquiry.³ The lien does not extend to debts contracted after the company has received notification of the transfer;⁴ but the unregistered assignee of the certificates having given no notice to the company, is in no better position as to advances to his assignor after the transfer than as to those made before. For according to the usual form the indebtedness secured is that of the person in whose name the stock stands on the books of the company.⁵ But notice of an equitable claim given a company is effectual

¹ *Jennings v. Bank of California*, (1889) 79 Cal. 323; s. c. 12 Am. St. Rep. 145, 150.

² Under Cal. Civil Code, § 324, providing that a transfer of stock by indorsement, and delivery of the certificate, "is not valid, except between the parties, until the same is entered on the books," an assignee of the certificate takes subject to the bank's equity, and, as the condition is sufficient to put him on inquiry, he is not a *bona fide* purchaser. *Jennings v. Bank of California*, (1889) 79 Cal. 323; s. c. 12 Am. St. Rep. 145, 151, citing *Vansands v. Middlesex Bank*, 26 Conn. 153, 154; *Taylor v. Weston*, 77 Cal. 534; *Stebbins v. Phenix Ins. Co.*, 3 Paige, 361; *Union Bank v. Laird*, 2 Wheat. 393; *McReady v. Rumsey*, 6 Duer, 582.

³ *Jennings v. Bank of California*, (1889) 79 Cal. 323; s. c. 12 Am. St. Rep. 145, 151, distinguishing *Anglo-Californian Bank v. Grangers' Bank*, 60 Cal. 362, where no condition was embodied in the certificate and the by-law relied on was not referred to therein nor printed thereon.

⁴ *Conant v. Seneca County Bank*, 1 Ohio St. 298. See, however, *Union Bank v. Laird*, 2 Wheat. 390. It is held in England that the company has no priority of lien over an equitable incumbrancer who advanced money on a deposit of the certificates, with notice to the company, before the debt to the company became due. *Bradford Banking Co. v. Briggs & Co.*, 31 Ch. Div. 19; s. c. 12 App. Cas. 29. See also *Miles v. New Zealand & Co.*, 32 Ch. Div. 266.

⁵ *Jennings v. Bank of California*, (1889) 79 Cal. 323; s. c. 12 Am. St. Rep. 145. In *Norton v. Norton*, 43 Ohio St. 509, a stockholder who owed the corporation which issued the stock, had pledged the shares for a debt, and had delivered them to his pledgee with an absolute power to sell and demand a transfer on the corporate books; but the pledgee not having exercised that power, it was held that the corporation might attach the stockholder's interest, compel a sale, and have the surplus remaining after the payment of the pledgee's debt applied to the pay-

only for a reasonable time and operates only as a notice not to allow registration of a transfer without giving the claimant an opportunity to establish his right.¹

ment of the debt due the corporation; and that the attachment took precedence over a later attachment by another creditor by garnishee process served on the pledgee.

¹*Societe Generale de Paris v. Tramways Union Co.*, 14 Q. B. Div. 424, 448; *Bradford Banking Co. v. Briggs*, 12 App. Cas. 29.

CHAPTER XXXIII.

REGISTRATION OF TRANSFERS.

§ 647. Introductory.

- 648. The usual form of transferring shares.
- 649. Registration of defective transfers.
- 650. Registration of transfers of shares held in trust.
- 651. Formal requisites of registration.
- 652. The object of registration.
- 653. Registration as evidence and notice.

§ 654. Grounds for refusing registration.

- 655. The same subject continued.
- 656. Damages for refusal to register.
- 657. Enforcement of registration—*Mandamus*.
- 658. Wrongful registration and liability of the corporation therefor.

§ 647. **Introductory.**—Where the charter or by-laws of a corporation provide that its stock shall be transferable only on the books of the company, the title to and ownership of the stock can only pass by a transfer on the books.¹ But though the by-laws of a corporation require the entry of transfers of shares on a stock-ledger, if none is kept and such a transfer is entered, according to the custom of the company, on the subscription list, and an assignment is indorsed on the shares themselves, and a new certificate is issued to the purchaser by the company, the latter can not deny the validity of the transfer.² The transfer must be registered in the manner

¹ *Koons v. Jeffersonville Bank*, 89 Ind. 178.

² *Stewart v. Walla Walla Print. & Pub. Co.*, (Wash. T. 1889) 20 Pacif. Rep. 605; *Crawford v. Providential Ins. Co.*, 8 U. C. Com. P. 263. In Alabama under the statutory provisions regulating the transfer of certificates of stock in incorporated companies, and providing that no transfer shall be valid, as against *bona fide* creditors and subsequent purchasers without notice, "except from the time such transfer shall

have been registered or made upon the book or books of such company," (Code, §§ 2041-2044) if a company has adopted no by-law regulating such transfer, and keeps only a single book of stock certificates with stub attached to each, on which are entered the date, name, serial numbers, etc., corresponding with each certificate issued, a memorandum entered on the stub, in these words, "Transf. to Winston Jones, assignee, for collateral, December 1, '84," is a substantial compliance with the

prescribed by the law under which the corporation acts, or in the manner in which it is accustomed to do business in order to bind it.¹ So when the by-laws require simply the production of the old certificate and that the transfer shall be made by the owner or his attorney, the application for a transfer by the attorney and the production of the certificate is a sufficient compliance with the rule, and the transferee is entitled to damages for a refusal to make the transfer complete on the books.² There has been some controversy concerning what officer the transferee should apply to for registration. No general rule can be given applicable to all cases, except, perhaps, that he should apply to the officer having general control of the books wherein registration is made.³ In the case above cited an application to the president of the company was held sufficient.⁴ In another, the person acting as secretary and treasurer of a railroad company was held to be the officer to whom it was proper to apply.⁵ And it would seem that the transferee may generally consider a refusal by the secretary equivalent to a refusal by the corporation.⁶ In the case of a bank, the cashier generally has authority to act for the company and to bind it in this respect.⁷ If the by-laws require the transfer to be made in the presence of the cashier or two witnesses, it must be attested by their signatures or the transfer is void.⁸

§ 648. The usual form of transferring shares.—Stock is ordinarily transferred by written assignment with a power of attorney to transfer upon the books of the company.⁹ “An

statutory requisition, and charges a subsequent creditor or purchaser with notice of such transfer. *Fisher v. Jones*, (1887) 82 Ala. 117.

¹ See, however, *Purchase v. New York Exchange Bank*, 3 Rob. (N. Y.) 164; *Stockwell v. St. Louis & Co.*, 9 Mo. App. 133.

² *Commercial Bank v. Kortright*, 22 Wend. 348; s. c. 34 Am. Dec. 317; *Green Mountain & Co. v. Bulla*, 45 Ind. 1.

³ *Green Mountain & Co. v. Bulla*, 45 Ind. 1.

⁴ *Green Mountain & Co. R. Co. v. Bulla*, 45 Ind. 1.

⁵ *Goodwin v. Ottawa & Co. Ry. Co.*, 13 U. C. C. P. 254.

⁶ *McMurrich v. Bond & Co.*, 9 U. C. Q. B. 333.

⁷ *Case v. Bank*, 100 U. S. 446. Cf. *Commercial Bank v. Kortright*, 22 Wend. 348.

⁸ *Planters' & Co. Ins. Co. v. Selma Savings Bank*, 63 Ala. 585; *Dane v. Young*, 61 Me. 160.

⁹ Certificates of stock, in almost every instance, have a blank power

assignment of the stock in writing is made by the former owner of it, with a power of attorney to transfer it on the books of the corporation. Books of transfer are kept for that purpose, and on the production of those papers, the nominated attorney makes the formal transfer, the old certificate is cancelled, and a new certificate is issued to the new owner."¹

§ 649. Registration of defective transfers.—A defective deed of transfer does not pass title in England and will not be registered until it is remedied.² In Louisiana a corpora-

of assignment printed on their back, generally in the following form:

"For Value Received, — have bargained, sold, assigned and transferred, and by these presents do bargain, sell, assign and transfer unto — the Capital Stock named in the within Certificate, and — do hereby constitute and appoint —, true and lawful attorney, irrevocable, for —, and in — name and stead, but to — use, to sell, assign, transfer and set over, all or any part of the said stock, and for that purpose to make and execute all necessary acts of assignment and transfer, and one or more persons to substitute with like full power.

"Dated, — —, 18—.

"— —.

"Signed and acknowledged in the presence of — —."

"Business Methods & Customs of Wall Street," by John H. Davis & Co.

¹ *Burrall v. Bushwick R. Co.*, (1878) 75 N. Y. 211. See also *Dunn v. Commercial Bank*, 11 Barb. 580; *State v. Ferris*, 42 Conn. 560; *Dutton v. Connecticut Bank*, 13 Conn. 493; *Chouteau Spring Co. v. Harris*, 20 Mo. 382; *First Nat. Bank v. Gifford*, 47 Iowa. 575.

The following is a usual form of an irrevocable power of assignment:

"Know all men by these presents,

that — — for value received have bargained, sold, assigned and transferred, and by these presents do bargain, sell, assign and transfer unto — —, — shares of the — stock of the — standing in — name on the books of the said — represented by certificate No. — herewith. And — do hereby constitute and appoint —, true and lawful attorney, irrevocably, for — and in — name and stead, but to — use, to sell, assign, transfer and make over all or any part of the said stock, and for that purpose to make and execute all necessary acts of assignment and transfer thereof, and to substitute one or more persons with like full power, hereby ratifying and confirming all that — said attorney or — substitute or substitutes shall lawfully do by virtue hereof.

"In witness whereof, — have hereunto set — hand and seal at — the — day of —, 18—.

"Signed, sealed, and delivered in the presence of

"— —. [L. s.]

"— —. — —."

"Business Methods & Customs of Wall Street," by John H. Davis & Co.

² *Manney v. Morgan*, 35 Ch. Div. 598.

tion which without a mandate "express and special" within the provisions of the code of that State has permitted a transfer of a stockholder's stock, is liable for its full value and for dividends unlawfully divested.¹ The lack of the owner's indorsement on the certificate is not inconsistent with the right of the attorney to cause the stock to be transferred to himself.² The neglect of the officers to require an indorsement of the certificate is only non-feasance, and is no evidence of conversion.³

§ 650. Registration of transfers of shares held in trust.

When stock is held by the person in whose name it stands on the books in a fiduciary capacity, the corporation has notice of that fact, and it is liable to the *cestui que trust* for a fraudulent transfer made by the trustee.⁴ Although the company is not chargeable with notice of a trust merely because certain officers have knowledge of it.⁵ But where stock which was inadvertently registered in the name of one of several beneficiaries was transferred by the *cestui que trust* in whose name it stood instead of that of the trustee, the corporation was held liable to the other beneficiaries.⁶ When stock is registered in the names of two or more persons as trustees, they must unite in making a transfer, and if one undertakes to transfer for all by signing the names of his co-trustees he ex-

¹ An order by the shareholder's general business agent is not such a mandate. *Woodhouse v. Crescent Mut. Ins. Co.*, 35 La. Ann. 238, (Manning, J., dissenting) construing La. Code, art. 2997.

² *Taft v. Presidio &c. R. Co.*, (1889) 84 Cal. 131; s. c. 6 Ry. & Corp. L. J. 329. If the attorney in fact of a stockholder presents the certificate of stock, together with a power of attorney from the stockholder giving him full authority to deal with the stock, and the corporation's officers are ignorant of any intention on the part of the attorney to misappropriate the stock, the corporation will not be guilty of conversion simply by issuing another certificate in the

name of the attorney, who appropriates the stock wrongfully. *Taft v. Presidio & Ferries R. Co.*, (1889) 84 Cal. 131; s. c. 6 Ry. & Corp. L. J. 329.

³ *Taft v. Presidio &c. R. Co.*, (1889) 84 Cal. 131; s. c. 6 Ry. & Corp. L. J. 329.

⁴ *Mechanics' Bank v. Seton*, 1 Pet. 299; *Cottam v. Eastern Counties Ry. Co.*, 1 John. & H. 243, where the signatures of the other trustees were forged by one. *Vide supra*, § 650.

⁵ *Ex parte Watkins, In re Kidder*, 2 Mont. & A. 348; *Ex parte Harrison*, 3 Mont. & A. 506.

⁶ *Farmers' &c. Bank v. Wayman*, 5 Gill, 336.

poses himself to the charge of forgery,¹ and the other trustees are entitled to be registered together with the person appointed to succeed the forger, as owners of the stock.² Equity will compel the corporation to purchase stock, when there has been such an illegal transfer, and substitute it upon its books for that which has been the subject of transfer.³ The injured party also has his remedy against the trustee, but his right of action against the corporation is not thereby barred, unless a judgment has been recovered and satisfied as against the trustee.⁴ The rights of the injured party may be lost or waived by laches,⁵ or barred by limitation.⁶ But a waiver of his remedy upon former breaches of trust is not considered to

¹ *Barton v. North Staffordshire Ry. Co.*, (1888) 38 Ch. Div. 458; *s. c.* 4 Ry. & Corp. L. J. 34; *Sloman v. Bank of England*, 14 Sim. 475; *Magwood v. Railroad Bank*, 5 Richardson, (S. C.) 379; *Bayard v. Farmers' &c. Bank*, 52 Pa. St. 232, where the company was sustained in refusing registration until its attorney had examined the terms of the trust; *Bird v. Chicago &c. R. Co.*, 137 Mass. 428; *Bohlen's Estate*, 75 Pa. 312, where there were two trustees and the transfer was made by one only; *Loring v. Salisbury Mills*, 125 Mass. 135, where the certificates contained the word "trustee." Certificates in the name of an institution, or in a name with title affixed — as "cashier," "president," or other official designation — are not a good transfer or delivery unless the assignment be acknowledged before a notary (with seal and date), who must certify that he knows the person signing, and knows him to be the person authorized to sign, and that he has seen the minutes of the institution authorizing said person to make said assignment. Many companies require, in addition, a certified copy of the resolution of the directors of the company in whose name the stock stands, authorizing the assign-

ment. The assignments of certificates in name of "administrator," "executor," etc., must be accompanied by a surrogate's certificate, showing that the party making the assignment is, by the terms of the will, made administrator, executor, etc., and authorized to dispose of said stock. Certificates in name of parties residing in foreign countries must have the assignments witnessed by United States consuls, with seal and date. "Business Methods & Customs of Wall Street," by John H. Davis & Co.

² *Barton v. North Staffordshire Ry. Co.*, (Ch. Div. March, 1880) 4 Ry. & Corp. L. J. 34, 37.

³ *Bohlen's Estate*, 75 Pa. St. 312; *Loring v. Salisbury Mills*, 125 Mass. 138.

⁴ *Loring v. Salisbury Mills*, 125 Mass. 138.

⁵ *Albert v. Savings Bank*, 2 Md. 159; *s. c.* 1 Md. Ch. 407.

⁶ *Barton v. North Staffordshire Ry. Co.*, (Ch. Div. March, 1888) 4 Ry. & Corp. L. J. 34, 36, citing and quoting the opinion of BEST, C. J., in *Davis v. Bank of England*, 2 Bing. 393, and declaring that opinion not affected by the reversal of the case which was founded upon another point; citing also *Coles v.*

estop him from seeking redress for a breach committed thereafter.¹ It has been held that the Bank of England need not recognize trusts or tenancies in common, being exonerated from registering transfers to tenants in common under the terms of the National Debt Act of 1870.²

§ 651. Formal requisites of registration.—In England the formalities of a stock transfer are strictly observed. The transfer is made by deed which is delivered to and kept in the custody of the secretary of the company, who makes an entry of it in a book called the “register of transfers” and indorses the entry on the deed.³ In the United States a substantial compliance with the requirements of the charter or by-laws or other statutory provisions respecting the transfer of stock is sufficient to complete the transfer.⁴ From the point of view occupied by the corporation it is of especial importance that a transfer should be properly recorded on the books, in order that it may know whom to treat as stockholders and thus avoid complications and perhaps liabilities and litigation. And an assignment of stock duly registered will, even when it contains some apparent irregularity, operate to protect the corporation.⁵ But, in order to obtain the full benefits of registration, the corporation must make the transfer on the books, and, so far as it is concerned, the registration must be made on books kept for that purpose, for if the duty is neglected it can not take advantage of its own wrong.⁶ And such a neglect to make the registration after the written assignment

Bank of England, 10 Ad. & E. 449, and *Sloman v. Bank of England*, 14 Sim. 486.

¹ *Loring v. Salisbury Mills*, 125 Mass. 138.

² *Law Guarantee & Trust Co. v. Bank of England*, (1890) 8 Ry. & Corp. L. J. 47; 33 & 34 Vic. ch. 71.

³ 8 Vic. ch. 16, § 15.

⁴ *National Bank v. Watson*, 105 U. S. 217; *Preston v. Cutter*, (1888) 64 N. H. 461; *Fisher v. Jones*, 82 Ala. 117.

⁵ *Pullman v. Upton*, 96 U. S. 328; *Webster v. Upton*, 95 U. S. 65; *In*

re South Mountain & Co., 7 Sawyer, 30; *Upton v. Hansborough*, 3 Biss. 417; *Moore v. Jones*, 3 Woods, 53; *Foreman v. Bigelow*, 4 Cliff. 503; *Seymour v. Sturges*, 26 N. Y. 134; *Cole v. Ryan*, 52 Barb. 168; *Mann v. Currie*, 2 Barb. 294; *Baldwin v. Canfield*, 26 Minn. 43.

⁶ *Brown v. Adams*, 5 Biss. 181; *Northrop v. Curtis*, 5 Conn. 246; *Marlborough Manuf. Co. v. Smith*, 2 Conn. 579; *McCurry v. Suydam*, 10 N. J. 245; *Pinkerton v. Manchester & Co. R. Co.*, 42 N. H. 424.

properly executed has been lodged with it for that purpose, or the failure to insist upon a registration after it has notice of a transfer, may operate as a waiver of its right to the protection afforded by a recorded transfer, particularly where it has performed certain acts or acquiesced in the performance of certain acts by the parties.¹ So, where the statute requires certain formalities to be observed in the transfer of stock, among which is the recording of a certificate, signed by its president, in the county clerk's office, and the company records such a certificate without the president's signature, it can not hold the original stockholder liable for unpaid calls.² So in a case when there is a transfer by attorney and the attorney records the transfer on the corporate books, but by mistake signs as attorney for the transferee instead of the transferrer, the corporation may recover instalments due upon the stock from the former.³ Stock may be transferred before the issue of shares,⁴ by substituting upon the subscription books the name of the transferee for that of the subscriber,⁵ who is then relieved of further liability.⁶

§ 652. The object of registration.—It is well settled that a transfer of stock, otherwise regular, operates only as a contract between the parties if there has been no record thereof on the books when the statute, charter or by-laws pro-

¹ *Weber v. Feckey*, 52 Md. 500, 516; *Isham v. Buckingham*, 49 N. Y. 216; *Baine v. Whitehaven Ry. Co.*, 3 H. L. Cas. 1; *Ex parte Walton*, 26 L. J. Ch. 545; *Clowes v. Brettell*, 11 Mees. & W. 461; *Walter's Case*, 3 De Gex & S. 149; *Sadler's Case*, 3 De Gex & S. 36.

² *Cutting v. Damerell*, 88 N. Y. 410; *Isham v. Buckingham*, 49 N. Y. 216; *Upton v. Burnham*, 3 Biss. 431, 520; *Strange v. Houston & Co. R. Co.*, 53 Tex. 162; *Murray v. Bush*, L. R. 6 H. L. 37; *Bargate v. Shortridge*, 5 H. L. 297. See also *Beach on Railways*, §§ 305, 374, 389. *Cf. Johnson v. Underhill*, 52 N. Y. 203; *Bosanquet v. Shortridge*, 4 Ex. 699.

³ *Bend v. Susquehanna Bridge Co.*,

6 Harr. & J. 128; s. c. 14 Am. Dec. 261; *Hartford & Co. R. Co. v. Boorman*, 12 Conn. 520; *Brigham v. Mead*, 10 Allen, 245; *Huddersfield Canal Co. v. Buckley*, 7 Term Rep. 36; *Evans v. Wood*, 37 L. J. Ch. 159.

⁴ *Bank v. Bank*, 105 U. S. 217; *State v. Butler*, (1888) 86 Tenn. 614; s. c. 4 Ry. & Corp. L. J. 178, 180.

⁵ *Ryder v. Alton & Co. R. Co.*, 13 Ill. 516.

⁶ *Burke v. Smith*, 16 Wall. 390; *Weinman v. Wilkinsburg & Co. Ry. Co.*, (1888) 118 Pa. St. 192; *Thorp v. Woodhull*, 1 Sandf. Ch. 411; *Brigham v. Mead*, 10 Allen, 245. *Cf. Upton v. Burnham*, 3 Biss. 431, 520; *Midland Counties Ry. Co. v. Gordon*, 16 Mees. & W. 804.

vide that transfers shall be made in that way. Thus where one is sued by a creditor of a corporation as a stockholder for the amount of his subscription remaining unpaid, it is no defense that he has transferred his interest in the stock to another, unless the transfer is made a matter of record on the corporate books, for the omission of registration does not relieve a stockholder of liability.¹ And it is held that, except as against the corporation, the owner of stock may, as an incident of his proprietary right, transfer the stock in the same manner in which he may dispose of the title to other personal property. So where certificates of stock are delivered in pledge as security for the payment of notes and the return of other stock lent, the pledgees are *bona fide* holders of the shares represented by the certificates as collateral security.² Likewise where one contracts with another to sell patent rights belonging to the latter, by which a corporation is to be formed, in the stock of which payment is to be made for the patent right, and half of what is realized above a certain sum is to be paid to the first party for his services, a third person who assists him in making the sale is simply his creditor, and does not confer title to the stock when issued.³ It is also held that an assignment of stock made for the simple purpose of enabling the transferrer to testify on its behalf in an action in which the corporation is a party is a valid transfer as between the parties, and passes the interest in the stock so as to render the transferrer a competent witness.⁴

§ 653. **Registration as evidence and notice.**—A transferee is not required to carry his investigation as to the title of his assignor to the stock beyond the books of the company, but may rely upon them, and if they show the assignor to be the owner of the stock which afterwards turns out to be spurious,

¹ Topeka Manuf. Co. v. Hale, (1888) 39 Kan. 23.

² Johnson v. Laffin, 103 U. S. 800, 804; Noyes v. Spaulding, 27 Vt. 420; Baldwin v. Canfield, 26 Minn. 43.

³ Thurber v. Crump, (1888) 86 Ky. 408.

⁴ Noyes v. Spaulding, 27 Vt. 420; United States v. Cutts, 1 Sumner,

133; Johnson v. Underhill, 52 N. Y. 203; Bank of Utica v. Smalley, 2 Cowen, 770; s. c. 14 Am. Dec. 526; First Nat. Bank v. Gifford, 47 Iowa, 575. Cf. Baldwin v. Canfield, 26 Minn. 43. See also Continental National Bank v. Eliot National Bank, 7 Fed. Rep. 369; Merchants' &c. Bank v. Richards, 6 Mo. App. 654.

it is no defense in an action against the corporation "that its officer had no authority to keep any but correct books."¹ And where the corporation is required by statute to keep a book for the registration of its stockholders, such a book is competent evidence of the transfer of stock.²

§ 654. Grounds for refusing to register transfers.—Under the Companies Clauses Act of England, a corporation may refuse to register a transfer of stock until the transferrer has paid all calls due from him upon his stock.³ And a call, within the meaning of the act, is made when the resolution authorizing it has been passed.⁴ This rule is followed in the United States.⁵ Even if the indebtedness of the stockholder to the corporation is less than the amount of stock held by him, the corporation can not be forced to register all the shares over and above the amount of the indebtedness.⁶ But where the original subscriber to the stock of a corporation neglected to pay the instalments, an assignee consenting to comply with the corporate regulations may, on tendering the amount of the instalments, with interest, maintain a suit in equity to compel an issue to him of a stock certificate.⁷ On the other hand, where stock is actually transferred upon which the corporation has a lien, without, however, any notice of the lien to the purchaser, the lien is discharged as to him.⁸ Under the Wisconsin statute, which provides that a corporation shall have a lien on all stock for debts due it from the owner, the purchaser of stock upon which a portion of the purchase price is still due from the original owner, is entitled to a registration of the transfer of the stock, subject to the

¹ *New York &c. R. Co. v. Schuyler*, 34 N. Y. 30, 76, 77; *Gray v. Portland Bank*, 3 Mass. 364; s. c. 3 Am. Dec. 156.

² *Preston v. Cutter*, (1888) 64 N. H. 461.

³ 8 Vic. ch. 16, § 16; *Hall v. Norfolk &c. Co.*, 21 L. J. Q. B. 94; *Regina v. Wing*, 17 Q. B. 645.

⁴ *Regina v. Londonderry &c. Ry. Co.*, 13 Q. B. 998; *Ex parte Tooke*, 18 L. J. Q. B. 343; *In re British Provident &c. Soc.*, 32 L. J. Ch. 633.

⁵ *McCready v. Rumsey*, 6 Duer, 574; *Brent v. Bank of Washington*, 10 Peters, 596; *Newbury v. Detroit &c. R. Co.*, 17 Mich. 141.

⁶ *Pierson v. Bank of Washington*, 3 Cranch, 363; *Sewall v. Lancaster Bank*, 17 Serg. & R. 285.

⁷ *Iron R. Co. v. Fink*, 41 Ohio St. 321; s. c. 52 Am. Rep. 84.

⁸ *West Nashville &c. Co. v. Nashville Savings Bank*, 87 Tenn. 252; *Ersine v. Loewenstein*, 82 Mo. 301; s. c. 11 Mo. App. 595.

lien of the corporation for the unpaid balance.¹ A corporation may not, by means of a by-law, create a lien on the stock of a stockholder indebted to it, and so defeat the transfer of the stock upon its books.² It can not refuse to make a transfer upon its books for want of consideration for the transfer.³ But it is not bound to recognize the transferee of one who subscribed before incorporation.⁴ A valid transfer may be made to a pauper, and, in the absence of any other objection, the transfer on the books may be compelled.⁵ The right of a *bona fide* assignee of a joint-stock certificate to have the transfer made on the company's books to his name is not affected by an attachment of the stock by his creditors. A charter provision that "all stock shall be transferable only on the books of the company" refers only to the relation between the shareholders and the company.⁶

§ 655. **The same subject continued.**—It is not the duty of the officers of a corporation to inquire into the motives of an attorney in fact, having full power to transfer stock, for desiring it to be transferred to himself. And the fact that the attorney is also a director of the corporation does not warrant the presumption that the corporation had notice of his intention to convert the stock to his own use, as he assumed to act, not for the corporation, but for his principal.⁷ Where there is doubt as to the right of either of two supposed transferees of the same stock to have the transfer registered, the corporation may, in an action against it for its refusal to register, either transfer or file a bill of interpleader.⁸ Where there

¹ Rev. Stat. Wis. § 1751; Herdegen v. Cotzhausen, (1888) 70 Wis. 539.

² Farmers' &c. Bank v. Wasson, 48 Iowa, 336; s. c. 30 Am. Rep. 398; Driscoll v. West Bradley &c. Co., 59 N. Y. 96; Steamship Dock Co. v. Heron, 52 Pa. St. 286; Mobile Mutual Ins. Co. v. Cullom, 49 Ala. 558; Williams v. Lowe, 4 Neb. 382, 398.

³ Helm v. Swiggett, 12 Ind. 194.

⁴ Hawkins v. Mansfield &c. Co., 52 Cal. 513; Morrison v. Gold Mountain &c. Co., 52 Cal. 306. *Contra*, Baltimore &c. Ry. Co. v. Sewell, 35 Md.

238; s. c. 6 Am. Rep. 402; Merrimac &c. Co. v. Levy, 54 Pa. St. 227.

⁵ Regina v. Midland Counties &c. Ry. Co., 15 Ir. Ch. 525.

⁶ Clark v. German Security Bank, 61 Miss. 611.

⁷ Taft v. Presidio &c. R. Co., (1889) 84 Cal. 131; s. c. 6 Ry. & Corp. L. J. 329.

⁸ Leavitt v. Fisher, 4 Duer, 1; Mechanics' Bank v. Richards, 74 Mo. 77; State Ins. Co. v. Gennett, 2 Tenn. Ch. 100; Purchase v. New York Exchange Bank, 3 Rob. (N. Y.) 164;

are two such claimants to stock he who holds the certificate is in the better position.¹ But if the corporation has registered the transfer of either of the claimants, it can not thereafter interplead, having expressly recognized a title to the stock.² Where a corporation receives notice of a transfer but is enjoined from completing it on the books; it must still observe the rights of the transferee.³ In England a corporation is bound to register shares purchased by a married woman in accordance with the terms of the Married Woman's Property Act,⁴ unless it can show that her title is not otherwise good.⁵ The company, having the control of the register, has it in its own power, while a going concern, to complete the membership of the transferee; but it may be doubted whether, after a winding-up order has been made, it has any right to have the register altered.⁶ By the English Companies Clauses Act the effect of the closing of the register of transfers for a specified time before such regular meeting is that "any transfer made during the time when the transfer books are so closed shall, as between the company and the party claiming under the same, but not otherwise, be considered as made subsequently to such ordinary meeting."⁷

§ 656. Damages for refusal to register.—Where the registration of a proper transfer of stock has, through the neglect or refusal of the corporation, failed, the corporation becomes responsible for the damages incurred.⁸ Thus when a transfer of corporate shares is made to one, but not recorded as the corporate by-laws required, and a creditor of the as-

Chapman v. New Orleans &c. Co., 4 La. Ann. 153; *Townsend v. McIver*, 2 S. C. 25; *State Ins. Co. v. Gennett*, 2 Tenn. Ch. 82.

¹ *Maybin v. Kirby*, 4 Rich. Eq. 105; *Societe Generale de Paris v. Tramways Union Co.*, 14 Q. B. Div. 424; s. c. L. R. 11 H. of L. 20. Cf. *Crawford v. Dox*, 5 Hun, 507.

² *Dalton v. Midland Counties Ry. Co.*, 12 C. B. 458.

³ *Purchase v. New York Exchange Bank*, 3 Rob. (N. Y.) 164.

⁴ 33 & 34 Vic. ch. 93, § 4.

⁵ *Regina v. Carnatic Ry. Co.*, L. R. 8 Q. B. 299.

⁶ *Shelford on Joint-Stock Companies*, 115, citing *Joint-Stock Discount Co.*, *Richell's Case*, L. R. 3 Ch. 119; *General Floating Dock Co.*, 15 L. T. N. S. 526; *Mitchell's Case*, L. R. 4 App. Cas. 548; *Chappell's Case*, L. R. 6 Ch. 902; *Weston's Case*, L. R. 4 Ch. 685; *Ex parte Parker*, L. R. 2 Ch. 685.

⁷ 8 Vic. ch. 16, § 17.

⁸ *Catchpole v. Ambergate &c. Ry. Co.*, 1 El. & B. 111.

signor, without notice, subsequently attaches the shares as his, and causes a sale and transfer to a third party, the first transferee may maintain an action against the corporation for its refusal to record the transfer to him.¹ And the party making the demand for registration upon the corporation, whether it be the transferee or his assignor, is entitled to recover for such damages as he has sustained from the refusal of the corporation.² But on failure to transfer stock at the request of a pledgee, a bank is not liable for subsequent depreciation of the stock.³ And a stock company, which refuses to transfer certain shares of stock on its books to the party to whom a certificate has been assigned, but marks them on the books as the property of another, is not liable in *assumpsit* for conversion of the stock, but only in an action on the case for damages for the refusal to note the transfer.⁴ The measure of damages in such cases is usually the same as that governing actions for conversion of stock.⁵

§ 657. Enforcement of registration—Mandamus.—The corporation must complete the transfer on its books upon the demand of either party, and equity will enforce the performance of this duty.⁶ Unless expressly provided by statute or articles of association of a corporation, its officers have no power or discretion to repudiate a transfer of stock.⁷ The power is sometimes delegated by the charter or articles of in-

¹ Hazard v. Exchange Bank, 26 Fed. Rep. 94.

² Hussey v. Manufacturers' &c. Bank, 27 Mass. 414; Telford & F. Turnpike Co. v. Gerhab, (Pa. 1888) 13 Atlan. Rep. 90; Helm v. Swiggett, 12 Ind. 194.

³ Dayton Bank v. Merchants' Bank, 37 Ohio St. 208.

⁴ Telford & F. Turnpike Co. v. Gerhab, (Pa. 1888) 13 Atlan. Rep. 90.

⁵ Iron R. Co. v. Fink, 41 Ohio St. 321; s. c. 52 Am. Rep. 84; Cleveland R. Co. v. Robbins, 35 Ohio St. 483.

⁶ Cushman v. Thayer Manuf. Co., 76 N. Y. 365; s. c. 32 Am. Rep. 315;

Johnson v. Laffin, 103 U. S. 800, 804; Webster v. Upton, 91 U. S. 65, 71; Eustace v. Dublin &c. Ry. Co., L. R. 6 Eq. 182.

⁷ Johnson v. Laffin, 5 Dill. 65; s. c. 103 U. S. 800; *In re Stanton &c. Co.*, L. R. 16 Eq. 559; Chappell's Case, L. R. 6 Ch. App. 902; Gilbert's Case, L. R. 5 Ch. App. 559; Weston's Case, L. R. 4 Ch. App. 20. But in *Ex parte Penny*, L. R. 8 Ch. 446, it was held that the directors might refuse to give their reasons for refusing to recognize a transfer and that it would be presumed that their reasons were sufficient.

corporation.¹ But courts will at all times scrutinize the exercise of this power to determine whether it has been just and reasonable,² for it is contrary to all customs and rules regulating transactions in stocks and may easily be greatly abused.³ Where, in order to complete the membership of any person, there is only wanting registration, or some formality on the part of the company, he can generally compel the company to perform the acts to complete his membership, and the transferrer has a similar right against the company;⁴ and although in general the person on the register as member at the time of a winding-up order is liable to contribute, if he has remained there through default of the company, he can have his name removed and be freed from that liability.⁵ Where it is possible, the transferee may file a bill in equity praying for a decree directing the registry to be made.⁶ In an action to compel the officers of a corporation

¹ *Bargate v. Shortridge*, 5 H. L. Cas. 297; *Shortridge v. Bosanquet*, 16 Beav. 84.

² *Moffatt v. Farquhar*, 7 Ch. Div. 591; *Robinson v. Chartered Bank*, L. R. 1 Eq. 32.

³ *Johnson v. Laffin*, 5 Dill. 65.

⁴ *Shelford on Joint-Stock Companies*, 115, citing *Ex parte Rudolph*, 32 L. J. Q. B. 369; *Swan v. North British Australian Co.*, 32 L. J. Ex. 273; *Ex parte Swan*, 30 L. J. C. P. 113; *Ward v. South Eastern R. Co.*, 29 L. J. Q. B. 177; *Ex parte Harris*, 29 L. J. Ex. 364; s. c. 5 H. & N. 809; *Taylor v. Great Indian Peninsular R. Co.*, 4 De G. & J. 559; *Midland R. Co. v. Taylor*, 31 L. J. Ch. 336, affirming *Taylor v. Midland R. Co.*, 28 Beav. 287; *Eustace v. Dublin Trunk R. Co.*, 16 Week. Rep. 1110; *Donaldson v. Gillet*, L. R. 3 Eq. 274; *Sweeney v. Smith*, L. R. 7 Eq. 324; *Ashworth v. Bristol R. Co.*, 15 L. T. 561; *Ex parte Rymer*, 14 Week. Rep. 276; *Regina v. General Cemetery Co.*, 6 E. & B. 415; *Copeland v. North Eastern R. Co.*, 6 E.

& B. 277; *Regina v. Liverpool R. Co.*, 21 L. J. Q. B. 284; *In re East Wheal Martha Mining Co.*, 33 Beav. 119; *Ex parte Marino*, L. R. 2 Eq. 226; 2 Ch. 596; *Iron Ship Building Co.*, 34 Beav., 597; *Ex parte Martin*, 2 H. & M. 669; *Ex parte Webb*, 9 Jur. N. S. 856; *Ex parte Parker*, L. R. 2 Ch. 685; *Ex parte Braginton*, 12 L. T. N. S. 259.

⁵ *Shelford on Joint-Stock Companies*, 115, citing *Ex parte Shepherd*, L. R. 2 Ch. 16; *Nation's Case*, L. R. 3 Eq. 77; *Ex parte Read*, 36 L. J. Ch. 472; *Ex parte Shipman*, L. R. 3 Eq. 219; *Ex parte Chatres*, 1 De G. & S. 581; *Ex parte Bennett*, 16 Week. Rep. 572; *Ex parte Ward*, L. R. 2 Ch. 431; reversing s. c. L. R. 2 Eq. 226; *Ex parte Walker*, L. R. 6 Eq. 30; *Ex parte Fox*, L. R. 5 Eq. 118; *In re Overend, Gurney & Co.*, *Ward's Case*, L. R. 4 Eq. 189; *Head and White's Cases*, L. R. 3 Eq. 84.

⁶ *Iron R. Co. v. Fink*, 41 Ohio St. 321; s. c. 52 Am. Rep. 84; *Cushman v. Thayer Manuf. Co.*, 76 N. Y. 365; s. c. 32 Am. Rep. 315; *Mechanics'*

to register a transfer of corporate stock, the corporation is not a necessary party.¹ In a suit to compel the officers of a corporation to register a transfer of stock, an agreement between the complainant's vendor and the defendant, from whom he purchased the stock, that the vendor would not transfer it to any third person, is not a good defense where it appears that the agreement was made after the defendant had sold the stock to complainant's vendor, and no consideration is alleged for the agreement. And an answer alleging that the complainant had acquired the stock without consideration, for the purpose of obtaining control of the corporation to the exclusion of defendant, and all other persons interested therein, states a good defense.² Where, however, the equitable remedy is not practicable, and the court can not direct a registry to be made, it will grant a recovery for damages.³ Whether or not a court of equity will compel registration by *mandamus* is involved in some uncertainty, though if no public interest is involved, and no sufficient reason is shown for the granting of any remedy, or other remedies are possible, it seems to be settled upon good authority that suitors can not resort to this proceeding.⁴ On the other hand, where registration is denied a party without ground for it, many valuable authorities are to the effect that this remedy is proper.⁵ As a general rule,

Bank v. Seton, 1 Peters, 299; *Burrall v. Bushwick R. Co.*, 75 N. Y. 211; *Iasigi v. Chicago &c. R. Co.*, 129 Mass. 46; *Walker v. Detroit Transit Ry. Co.*, 47 Mich. 338. *Cf.* *Regina v. Liverpool &c. Ry. Co.*, 21 L. J. Q. B. 284.

¹ *Gould v. Head*, (1890) 41 Fed. Rep. 240.

² *Gould v. Head*, (1890) 41 Fed. Rep. 240.

³ *Smith v. North American Mining Co.*, 1 Nev. 423.

⁴ *Murray v. Levens*, 110 Mass. 95; *Shipley v. Mechanics' Bank*, 10 Johns. 484; *Birmingham Fire Ins. Co. v. Commonwealth*, 92 Pa. St. 72; *Ex parte Fireman's Ins. Co.*, 6 Hill, 243; *People v. Parker &c. Co.*, 10 How. Pr. 543; *State v. Rombauer*, 46

Mo. 155; *State v. St. Louis &c. Co.*, 21 Mo. App. 526; *Townes v. Nichols*, 73 Me. 515; *Wilkinson v. Providence Bank*, 3 R. I. 22; *Baker v. Marshall*, 15 Minn. 177; *Kimball v. Union Water Co.*, 44 Cal. 173; *State v. Guerrero*, 12 Nev. 105; *King v. Bank of England*, 2 Doug. K. B. 524; *King v. London Assurance Co.*, 1 Dowl. & R. 510; *Queen v. Liverpool &c. Ry. Co.*, 21 L. J. Q. B. 284; *Rex v. Worcester Navigation Co.*, 1 Mon. & R. 529.

⁵ *People v. Goss Manuf. Co.*, 99 Ill. 355; *State v. First Nat. Bank*, 89 Ind. 302; *Green Mountain &c. Co. v. Bulla*, 45 Ind. 1; *State v. Cheraw &c. R. Co.*, 16 S. C. 524; *Townsend v. McIver*, 2 S. C. 25; *Cooper v. Swamp &c. Co.*, 2 Murph. (S. C.) 195; *Good-*

however, *mandamus* does not lie against the officers of a private corporation to compel the transfer of stock.¹ In a recent case on application for *mandamus* to compel the transfer by a corporation of shares of stock on its books to relator, it was held that *mandamus* will only lie when there is a clear legal right, and that the relator's right was only equitable.²

§ 658. Wrongful registration, and liability of the corporation therefor.—If a transfer is improperly allowed, the company is liable to the party injured.³ Accordingly, if upon presentation of an application for the transfer of stock, the officers of the company are not satisfied that the proposed transfer is regular and proper, they may require the person applying for the transfer to produce sufficient proof of his authority.⁴ They may take a reasonable length of time to complete their investigations.⁵ Where a forged transfer has been registered and the purchaser thereunder sells to an innocent third party new certificates issued by the company, the company is liable upon the statements contained in the new certificates. The measure of damages in such a case is the value of the stock at the time of the company's refusal to recognize the last purchaser of the stock.⁶ The fact that the

win *v. Ottawa &c. Ry. Co.*, 13 U. C. C. P. 254; *People v. Crockett*, 9 Cal. 112; *Regina v. Carnatic Ry. Co.*, L. R. 8 Q. B. 299; *Norris v. Irish Land Co.*, 8 El. & B. 512; *Browne & Theobald's Ry. Law*, 73, citing *Ward v. South Eastern Ry. Co.*, 29 L. J. Q. B. 177.

¹ *Tobey v. Hakes*, (Conn. 1887) 7 Atlan. Rep. 551.

² *Burnsville &c. Co. v. State*, (1889) 119 Ind. 382. *Cf. Tregear v. Etowanda Water Co.*, (1888) 76 Cal. 537; s. c. 9 Am. St. Rep. 245.

³ *Cohen v. Gwynn*, (1848) 4 Md. Ch. 357; *Mechanics' Bank v. Seton*, 1 Pet. 299.

⁴ *Telegraph Co. v. Davenport*, 97 U. S. 369; *Davis v. Bank of England*, 2 Bing. 393. And if they deem it necessary they may require the presence of the stockholder himself.

Telegraph Co. v. Davenport, 97 U. S. 369; *Mechanics' Banking Assoc. v. Mariposa Co.*, 3 Rob. (N. Y.) 395; *Davis v. Bank of England*, 2 Bing. 393.

⁵ *Bayard v. Farmers' &c. Bank*, 52 Pa. St. 232; *Societe Generale de Paris v. Walker*, 11 App. Cas. 21, 41; *Colonial Bank v. Whinney*, 11 App. Cas. 426. But a reasonable time only can be consumed in the investigation, and unnecessary delay, even the unexplained delay of more than a day, has been held sufficient to entitle the transferee to damages: *Catchpole v. Ambergate &c. Ry. Co.*, 1 El. & B. 111; *Sutton v. Bank of England*, 1 Craig & P. 193.

⁶ *In re Bahia &c. Ry. Co.*, L. R. 3 Q. B. 584; *Hart v. Frontino &c. Co.*, L. R. 5 Ex. 111. The certificate is an evidence of the title of the per-

company consults counsel before making the transfer to the purchasers does not protect it from liability, if there is no evidence as to what facts were communicated, or what records exhibited, to the attorney upon which he based his opinion.¹ Where a corporation negligently cancels a member's stock, and issues certificates therefor to a third person, who has purchased it from one not authorized to sell it, the true owner is not bound to pursue the purchaser, but may proceed directly against the corporation alone, to compel it to replace his stock, or pay him its value.² A stockholder may sue the corporation alone for the value of his stock, illegally transferred, or he may contest the title of the transferee contradictorily with both.³

son in whose name it is issued to a portion of the capital of the company, and that fact is formally certified by the corporation. *Manhattan Beach Co. v. Harned*, 23 Blatchf. 494; *Machinists' National Bank v. Field*, 126 Mass. 345; *In re Bahia &c. Ry. Co.*, L. R. 3 Q. R. 584.

¹ *Caulkins v. Memphis Gas Light Co.*, (1887) 85 Tenn. 683; s. c. 4 Am. St. Rep. 786.

² *St. Romes v. Levee Steam Cotton-Press Co.*, (1888) 127 U. S. 614.

³ *Woodhouse v. Crescent. Mut. Ins. Co.*, 35 La. Ann. 238.

CHAPTER XXXIV.

NEGOTIATION OF STOCK AND BONDS, AND HEREIN OF COUPONS AND RECEIVERS' CERTIFICATES.

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| <p>§ 659. Rules and customs of the Stock Exchange.</p> <p>660. Brokers and agents.</p> <p>661. The same subject continued—
The principal's instructions.</p> <p>662. Speculative contracts.</p> <p>663. Future deliveries.</p> <p>664. <i>Bona fide</i> purchasers — (a) In general.</p> <p>665. (b) Of shares of stock.</p> <p>666. (c) Of bonds and coupons.</p> <p>667. Forgery or fraud.</p> <p>668. The Schuyler frauds.</p> <p>669. Spurious stock.</p> <p>670. Lost or stolen certificates of stock.</p> <p>671. The same subject continued.</p> <p>672. Lost or stolen bonds.</p> <p>673. Breach of trust — (a) In general.</p> <p>674. (b) The company's right to question transfers by trustees.</p> <p>675. (c) The company's liability.</p> <p>676. The same subject continued—
The English rule.</p> <p>677. Stock certificates not strictly negotiable.</p> | <p>§ 678. <i>Quasi</i>-negotiability of stock grounded in estoppel.</p> <p>679. Transfer by power of attorney not indorsed on the certificate.</p> <p>680. Of the registered transferee.</p> <p>681. The same subject continued.</p> <p>682. Of the unregistered transferee of the certificate.</p> <p>683. The same subject continued.</p> <p>684. Negotiability of bonds and coupons.</p> <p>685. Essentials of negotiability.</p> <p>686. Limitations on negotiability.</p> <p>687. References between bonds, coupons and mortgages.</p> <p>688. Alteration of the numbers of bonds.</p> <p>689. Maturity of bonds.</p> <p>690. Coupons as negotiable instruments.</p> <p>691. Formal requisites of negotiability of coupons.</p> <p>692. Coupons likened to checks, drafts, bills and notes.</p> <p>693. Coupons as instruments <i>sui generis</i>.</p> <p>694. Receivers' certificates.</p> |
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§ 659. Rules and customs of the Stock Exchange.—“The rules of the Stock Exchange, like the customs of any other trade, are binding so long as they are reasonable and legal, and are binding not only upon its members, but upon those dealing with them, and many questions have arisen as to how far those rules are reasonable, and how far members of the Stock Exchange can avail themselves of those rules to escape liability. The general principle applicable to the Stock Ex-

change, as well as other trades, is that a person who deals in a particular market must be taken to deal according to the custom of that market, and he who directs another to make a contract at a particular place must be taken as intending that the contract may be made according to the usage of that place. But the rules of the Stock Exchange, being the rules of a domestic forum, can not affect persons who are neither members nor their clients. Thus they can not affect the rights of the general creditors of a defaulting member. A defaulting member, therefore, can not voluntarily pay money to the official assignee to be distributed exclusively amongst those creditors whose claims arise out of Stock Exchange transactions, for that is a fraud upon the general creditors. And if it be urged that that is a rule of the Stock Exchange, the answer, as Lord Justice James said, is that the Stock Exchange is not an *Alsatia*, the Queen's laws are paramount there, and the Queen's writ runs even into the sacred precincts of *Capel Court*.”¹ “But the official assignee may lawfully distribute among Stock Exchange creditors the money which he receives from those members who owe differences on their contracts with the defaulter, for that is an artificial fund created by the rules, and does not form part of the general assets of the defaulter. According to the usage of the Stock Exchange, a buying jobber is at liberty by a given day, called the ‘name day,’ to substitute another person as buyer and so relieve himself from further liability on the contract. And this is a reasonable usage founded on general convenience, and the purchase or sale of shares made by one who is not a member, through a broker who is a member, will be treated as made subject to such rule.”² So where a person, competent and willing to accept the stock, has been found, and a transfer made and executed by the vendor and accepted by the transferee, the purchasing broker is discharged from liability;³ and if the transfer

¹ Williams' Forensic Facts and Fallacies, (1885) 106, 107. It is well settled that no customs among brokers or rules of Stock Exchanges can divest parties of their legal rights. *Robinson v. Norris*, 51 How. Pr. 442.

² Williams' Forensic Facts and Fal-

lacies, (1885) 107; *Browne & Theobald's Ry. Law*, 71; *Maxtel v. Paine*, L. R. 6 Ex. 132. Cf. *Allen v. Graves*, L. R. 5 Q. B. 478.

³ *Grissell v. Bristowe*, L. R. 4 C. P. 37; *Coles v. Bristowe*, 4 Ch. 3.

is accepted by the recognized brokers of the transferee, it is sufficient to complete the contract.¹ But the name so given must be that of a person *able* and willing to purchase; and if the name given is that of a non-existent person, a lunatic, an infant, or a person who has not given authority for the use of his name, the jobber will remain liable, though the time limited by the rules for objecting has gone by, and though the jobber be unaware of the incapacity of the person named.² The effect of this custom is to treat the ultimate buyer or seller as buying from or selling to the person whose name is given to him on the name day. And this is a reasonable custom, and exempts the jobber from liability in respect of calls or otherwise where he has given the name of a person capable of purchasing.³

§ 660. Brokers and agents.—The general rules of agency apply to transfers of stock by agents. They must act strictly within the authority conferred, and, of course, can not transfer the stock when it is given for another purpose.⁴ In a case where the same person acts as agent or broker for both the parties to a transfer, the loss will fall entirely upon the vendor if the certificates have been delivered and the agent

¹ *Loring v. Davis*, 32 Ch. Div. 625; *Sheppard v. Murphy*, L. R. 2 Eq. 544; *Bowring v. Shepherd*, L. R. 6 Q. B. 309.

² Where, however, the transferee is only a fictitious person named by the real purchaser, the jobber will be relieved of liability, provided the vendor has accepted the name. *Maxted v. Paine*, L. R. 6 Ex. 132.

³ Where the stocks or bonds a customer desires to trade in are not regularly listed in the New York Stock Exchange, they are known as "Unlisted" or "Outside" securities, and have to be dealt in either in the unlisted department of the Exchange, or on the street. They are not recognized by the Exchange and dealings in them are not governed by the same rules as apply to the listed securities. The latter are the

mortgages and shares of such railway and other companies as have filed with the Exchange a sworn statement of their financial condition, and the amount of their capital and bonded debt, described in detail, and which statements have been thoroughly examined and approved by the "Committee on the Listing of Securities" of the New York Stock Exchange. Companies whose securities are so listed are required by the Exchange to give thirty days' notice of any intention to increase or reduce their capital or bonded indebtedness. *Davis' Business Methods & Customs*.

⁴ *Persch v. Quiggle*, (1868) 57 Pa. St. 247; *Merchants' Bank v. Livingston*, 74 N. Y. 223; *Fisher v. Brown*, 104 Mass. 259; *Sabin v. Bank of Woodstock*, 21 Vt. 353; *Colquhoun v. Courtenay*, 43 L. J. Ch. 338.

absconds with the purchase money, even if the transfer has not been recorded, and the vendee may demand registration.¹ Where, however, a principal indorses stock in blank and delivers the certificates to his agent he can not, thereafter, repudiate a sale of the stock which has been made by the agent.² A broker is usually an intermediary between the buyer and seller of stock, and the details of a transaction through a stock broker are governed to a very considerable extent by the rules and customs of the Stock Exchange.³

§ 661. The same subject continued — The principal's instructions.—A broker has no power to deviate from the instructions given him by his principal when the order is made,⁴ though he may correct a palpable error so as to pre-

¹ *Ex parte Shaw*, 2 Q. B. Div. 463.

² *McNeil v. Tenth National Bank*, (1871) 46 N. Y. 325; *Strange v. Houston & T. C. R. Co.*, (1880) 53 Tex. 162.

³ *Biederman v. Stone*, L. R. 2 C. P. 504. For purchases or sales in the New York market the commission is one-eighth of one per cent. on the par of 100, being at the rate of \$12.50 on every \$10,000 in bonds, or on one hundred shares of stock the par value of which is \$100 per share. *Davis' Business Methods of Wall St.* The prices quoted for bonds or stocks on the New York Stock Exchange are so much per cent. on the par of 100. Quotations for bonds in the New York, Philadelphia and Baltimore markets are what are known as "flat," which means that they cover whatever accrued interest there may be due on the bonds, unless it be especially stated that to the price quoted must be added the accrued interest. In the Boston market the quotation means that accrued interest must be added to the price named. Accrued interest is the amount of interest on the par value of the bonds, at whatever rate of in-

terest they draw, from the date the last coupon was paid to the day the purchase, or sale, is closed. *Davis' Business Methods of Wall Street.* As a rule any individual with the capacity for making contracts may act as broker, though this privilege has been denied to national banks. *First National Bank v. Hoch*, 20 Alb. L. J. 215.

⁴ *Clarke v. Meigs*, 10 Bosw. 337; *Parsons v. Martin*, 77 Mass. 111. The whole class of stock operations ordinarily carried on in New York may be classified as follows: 1. Buying for a rise, or going "long" of stocks. 2. Selling for a decline, or going "short" of stocks. 3. Buying or selling as above, but on "options." 4. Buying or selling "privileges," generally known as "puts," "calls" and "spreads." The last named are not recognized by the New York Stock Exchange. 1. Buying for a rise is by far the most ordinary transaction with non-professional speculators. In this case the customer usually deposits \$1,000 in his broker's hands as a ten per cent. "margin" on one hundred shares of stock which he orders to be pur-

serve his client's interests.¹ And where the order given is for the purchase of stocks there is an implied authority to con-

chased, and which his broker holds, or "carries," for him until ordered to sell the same, or until the margin is about exhausted. In the latter case, if the customer, on request, fails to put up more margin, the broker is at liberty to sell the stock immediately, and charge him with the loss, if any. Interest is charged the customer on the purchase price, with buying commission added, usually at six per cent., as long as the stocks are carried. In case of a tight money market the broker is entitled to charge his customer any additional price which money actually commands, for carrying the stocks. A party carrying stocks for a rise is said to be "long" of the market or a "bull." 2. Selling for a decline, or going "short" of stocks (being a "bear"), is also a very common transaction, and is simply the opposite of buying, as above, except that the seller, not having the stock, is obliged to borrow it for present delivery, and take the risk of buying it back at a future day, to return to the lender. Aside from the ordinary fluctuations of the market, the chief risk in thus "selling short" is in the chance of a "corner" in the stock in case a clique get control of it and force prices up to extraordinary figures. This is a rare operation, but has at times been effected in the New York market with disastrous consequences to those who were "short" of the cornered stocks. As a general rule, nothing beyond the ruling rate of interest is paid for the use of the stock; but in case it is scarce, a consideration has to be paid for the use from day to day. Mar-

gins and commissions are the same as above. 3. Buying or selling on "options" is a transaction in which the purchaser or seller, as the agreement may be, has the option to call for or tender the stock at the price named, at any time within the period limited by the contract; but the Stock Exchange does not recognize contracts running over sixty days. In purchases on buyer's option (for any time over three days) the buyer is charged with interest on the price of the stock up to the time he calls for it. 4. Stock privileges, or "Puts," "Calls," and "Spreads" or "Straddles," as they are commonly called, are contracts entitling the holder to receive or deliver certain stocks at any time within a period limited (usually thirty or sixty days) and at a price therein specified; in the case of "spreads" the privilege is either to receive or deliver. A certain cash price is paid for the contract by the purchaser, and his entire liability in the transaction is limited to that amount; and, as the question of interest does not enter into the matter, the uncertainties of the money market need not be taken into consideration. A "Put" entitles the holder to put or deliver stock to the signer thereof, within the time and at the price therein named. A "Call" entitles the holder thereof to call for or demand stock from the signer thereof, according to terms specified. A "Spread" is a double privilege, and entitles the holder either to deliver to, or demand from, the signer thereof, the stocks named in it, according to the terms of the agree-

¹ Luffman v. Hay, 13 N. Y. Week. Dig. 324.

summate the trade,¹ except, of course, where the client is incapable of contracting, in which case the broker becomes liable.² It has been claimed that it is an unreasonable custom or rule that a broker is only bound to recognize the person actually employing him, and to obey the directions of that person only as to the disposal of the proceeds of a sale of stock.³ A broker, in executing the instructions given by a customer, can not become a party to a contract which he makes in behalf of his customer,⁴ but must act in good faith and can not derive any advantage from the transaction hostile to the best interests of his client.⁵ A reasonable time is given for the execution of orders.⁶

§ 662. Speculative contracts.—At common law a contract depending upon the happening of an event in the future was not invalid.⁷ And much as the judges have lamented the

ment. If the prices named in both cases are the same, then it is known as a "Straddle." To the purchaser of "Puts," "Calls," or "Spreads" there is no liability to loss beyond the amount paid in cash for the contract. Davis' Business Methods & Customs.

¹ Bayley v. Wilkins, 7 Com. B. 886. "All orders except 'stop-loss' orders are considered in force for the day only on which they are given, when nothing to the contrary is stated. When no price is mentioned by a customer, in giving or sending an order, it is understood to be at the market price, and the broker fills it at the best price obtainable at the time. When the stock ordered bought (or sold) is limited, nothing can be done until that limit is reached. When the customer says buy or sell at *about* a certain price, it is understood that his broker can take a discretion of one-eighth of one per cent. either way. Davis' Business Methods & Customs.

² Ruchizky v. De Haven, 97 Pa. St. 202; Nickalls v. Merry, L. R. 7 H. L. 520; Maxted v. Paine, L. R. 4

Ex. 81; Heritage v. Paine, 2 Ch. Div. 594; s. c. 34 L. T. 947; Dent v. Nickalls, 29 L. J. Ch. 536.

³ Williams' Forensic Facts & Fallacies, (1885) p. 108.

⁴ Marye v. Strouse, 5 Fed. Rep. 483; Conkey v. Bond, 36 N. Y. 427; Tausig v. Hart, 58 N. Y. 425; Robinson v. Mollett, L. R. 7 H. L. 802; Brookman v. Rothschild, 3 Sim. 153.

⁵ Levy v. Loeb, 85 N. Y. 365; s. c. 89 N. Y. 386; Voris v. McCready, 16 How. Pr. 87; Dey v. Holmes, 103 Mass. 306; Pickering v. Demeritt, 100 Mass. 416.

⁶ Fletcher v. Marshall, 15 Mees. & W. 755.

⁷ Irwin v. Williar, 110 U. S. 499. Speculative transactions, as distinguished from regular invested dealings, are those conducted on "margins," and in which the operator does not pay or receive the actual price of the stocks bought or sold, but simply places a sufficient margin in the hands of his broker (usually ten per cent. of the par value) to protect the latter against loss from fluctuations in the price. A party

practice they have not seen their way to declare it illegal. It is no doubt reprehensible, but, so far at least as the broker is concerned, it lacks the essential element of wagering, which is that each party shall win or lose according to the event.¹ It is under the cloak of contracts for the future delivery of shares that gambling contracts are concealed. The latter are against public policy; and numerous attempts have been made to prohibit the practice by legislation.² But the history of these stock-jobbing acts seems to prove conclusively that they have never been effective in preventing speculations in stocks. It is said that "in almost every instance in which they have been adopted, after lingering for years on the books, scorned and violated by 'the unbridled and defiant spirit of speculation,' despite the earnest efforts of the courts to enforce them, they have finally been repealed."³ The intent of the parties is the

who purchases stocks in anticipation of a rise, but pays the actual price thereof, is not, according to the usual acceptance of the term, engaged in speculation. *Davis' Business Methods & Customs.*

¹The broker can, therefore, in such a case sue his principal for commission and indemnity. *Williams' Forensic Facts & Fallacies*, (1885) p. 108; *Browne & Theobald's Ry. Law*, 70. It should be clearly understood that the ultimate responsibility in stock operations is with the customer. He runs the risk of the failure of his own broker; nor can he hold him responsible for losses occasioned by the fraud or failure of others with whom he had made contracts. The broker stands in the position of an agent acting for his principal.

²8 & 9 Vic. ch. 109, § 18; *Thacker v. Hardy*, 4 Q. B. Div. 689; *Grize-wood v. Blane*, 11 C. B. 526; *Barry v. Croskey*, 2 J. & H. 1; N. Y. 1 Rev. Stat. 662, § 8; *Harris v. Tumbridge*, 83 N. Y. 92; *Kingsbury v. Kirwan*, 77 N. Y. 612; *Story v. Saloman*, 71 N. Y. 420; *Yerkes v. Salo-*

man, 11 Hun, 471; *Laws of Pa.* 1841, p. 398, § 6, (which has, however, been repealed); *Kiause v. Settle*, 2 Phila. 289; *Chillas v. Snyder*, 1 Phila. 289; Rev. Stat. Illinois, ch. 38, § 130, (*Cothran's ed.* 1887); *Pickering v. Cease*, 79 Ill. 328; *Sanborn v. Benedict*, 79 Ill. 309; *Pixley v. Boynton*, 79 Ill. 351; 12 U. S. Stat. 719; Gen. Stat. Mass. ch. 105, § 6; *Brown v. Phelps*, 103 Mass. 313; *Price v. Minot*, 107 Mass. 49; *Colt v. Clapp*, 127 Mass. 476; *Ohio Laws*, May, 1885. That "cornering" the market is illegal, see *Arnot v. Pittston & Co. Coal Co.*, 68 N. Y. 558; *Sampson v. Shaw*, 101 Mass. 145; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *Raymond v. Leavitt*, 13 Cent. L. J. 110; *Barry v. Croskey*, 2 Johns. & H. 1. With respect to contracts to buy or sell stock for the purpose of controlling the market price, see *Tobey v. Robinson*, 99 Ill. 202; *Quincy v. White*, 63 N. Y. 370, 383; *Fisher v. Bush*, 35 Hun, 641; *Livermore v. Bushnell*, 5 Hun, 285.

³*Dos Passos, Stock-brokers and Stock Exchanges*, 405; *Dewey on*

element governing the application of legal rules to such contracts, and where the understanding is, either expressly or by implication, that there is to be no delivery, but merely an adjustment of balances between the parties, it is a wager contract and void.¹ The question of intent in such a transaction is usually a question for the jury; and when it is found that there was an intention to deliver, even though one of the parties to the transaction did not share it, the contract is valid.² When the transaction is made through a broker, the person employing him is responsible to him for his commissions and disbursements to the same extent as though the contract were legal and a *bona fide* delivery were intended,³ even though the broker were aware of its being a gambling contract.⁴

§ 663. Future deliveries.—A contract by which stock is sold at a certain price with the option to the purchaser to resell it at a future time for an increased price, which increase is only the amount of interest which, by the time of exercising the option, would accrue on the amount paid for the stock, is

Contracts for Future Delivery and Commercial Wagers, 23.

¹ In an action to recover a sum of money alleged to be due on a sale of stock the defense set up was that the transactions were gambling transactions, and that it was never intended that any of the stocks or shares should be delivered on one side or the other. It appeared from the evidence that the defendant was a working gardener in receipt of 90*l.* per annum. Before the transactions, the subject of this action, commenced, there had been various dealings between the plaintiff and the defendant, which had resulted in a balance in the defendant's favor. After this various other transactions were entered into, chiefly buying and selling "Tinto" shares, which eventually resulted in a loss to the defendant of over 400*l.* There was no suggestion in any of the correspondence that the shares should

be taken up, although in one case the plaintiff actually had taken up some shares to save himself. It was held, that whether it was a gambling transaction was simply a question of evidence, and that, since neither party contemplated delivering or accepting shares, it was a gambling transaction and void. *James v. Sheppard*, (Q. B. Div. 1889) 6 Ry. & Corp. L. J. 478; *Roundtree v. Smith*, 108 U. S. 269; *In re Hunt*, 26 Fed. Rep. 739; *Greenhood on Public Policy*, 230-237.

² *Irwin v. Williar*, 110 U. S. 499; *Whitesides v. Hunt*, 97 Ind. 191; *Pixley v. Boynton*, 79 Ill. 351; *Gregory v. Wendell*, 39 Mich. 337.

³ *Thacher v. Hardy*, 4 Q. B. Div. 685; *Ex parte Rogers*, 15 Ch. Div. 207.

⁴ *Knight v. Fitch*, 15 C. B. 566; *Jessopp v. Lutwyche*, 10 Ex. 614; *Lyne v. Liesfield*, 1 H. & N. 278; *Ex parte Rogers*, 15 Ch. Div. 207.

not a gambling contract.¹ Nor is an agreement void by which a trustee, with the consent of his *cestui que trust*, assigns stock held by him in his fiduciary capacity to a third party as trustee to sell and account to the owner, or, if not sold within a year, to return it to the owner.² And a contract for the sale of stock without delivery is not necessarily void, even if the time of delivery is not fixed, for the implication is that delivery shall be made within a reasonable time, and either party may enforce the performance if he has not otherwise waived his rights.³ A contract, however, to sell, "in consideration of one dollar, receipt of which is acknowledged," certain railway stock at a stated price, "if taken on or before" a certain day, is void on its face under a statute which makes void all contracts for the future sale of grain or railroad stock, whether such contracts are to be settled by paying differences or not.⁴

§ 664. **Bona fide purchasers** — (a) **In general.**—The general rules of law respecting *bona fide* purchasers of commercial paper for value, before maturity, are applied to stock and corporate securities so far as their peculiar nature will admit. Although corporate bonds may have been wrongfully put into circulation, a purchaser in good faith, ignorant of the circumstances, may enforce their payment.⁵ Accordingly, where a corporation was authorized to issue bonds secured by mortgage to the amount of two-thirds of its capital paid in, and it issued bonds to an amount less than two-thirds of its authorized capital, but much more than the amount paid in, the bonds were enforceable in the hands of *bona fide* holders.⁶

¹ *Richter v. Frank*, (1890) 8 Ry. & R. Co., (1858) 21 How. 442; *Grand Corp. L. J.* 66; s. c. 41 Fed. Rep. 859.

² *Duchenim v. Kendall*, (1889) 149 Mass. 171.

³ *Bruce v. Smith*, 44 Ind. 1. *Acc.* *Keichuer v. Gettys*, 18 S. C. 521; *Cheale v. Kenward*, 3 De Gex & J. 27; *Stewart v. Canty*, 8 Mees. & W. 160.

⁴ *Schneider v. Turner*, (1889) 7 Ry. & Corp. L. J. 46; s. c. 130 Ill. 28.

⁵ *De Kay v. Voorhis*, 36 N. J. Eq. 37; *Hackensack Water Co. v. De Kay*, 36 N. J. Eq. 548; *Pearce v. Madison*

R. Co., (1858) 21 How. 442; *Grand Rapids &c. R. Co. v. Sanders*, 17 Hun, 552; *Webb v. Herne Bay Commissioners*, L. R. 5 Q. B. 642.

⁶ *Hackensack Water Co. v. De Kay*, 36 N. J. Eq. 548. *Acc.* *Ellsworth v. St. Louis &c. R. Co.*, 98 N. Y. 553. And where, under statutory authority, certain mortgage bonds were issued by a water company, and taken by the contractors who built the company's works in part payment therefor, and the company's property and franchises

So in respect of stock certificates, if the owner indorses them in blank, and puts them in the hands of a broker or agent, who sells or pledges them in fraud of the owner's rights, he nevertheless can not reclaim it from an innocent holder for value.¹ But where the by-laws and certificates of a corporation provide that stock shall be transferable only on the books of the company, either in person or by attorney, and upon the surrender and cancellation of the old certificate, no one can claim to be a *bona fide* holder of the stock who acquiesces in the registration of his name as a stockholder without insisting upon the surrender and cancellation of the certificate, even if new certificates are issued to him, for the failure to produce the old certificates for cancellation is notice of the possible existence of equities against him.²

§ 665. (b) **Of shares of stock.**—A statute which provides that the delivery of a stock certificate of a corporation to a *bona fide* purchaser, with a written transfer or power of attorney, shall be a sufficient delivery to pass title, in no way affects the power of an executor or trustee to sell and convey property.³ It has been held that simple knowledge of the fact that his vendor holds the stock in trust does not put the vendee upon further inquiry,⁴ but this has been strongly disapproved.⁵ Certainly, if the purchaser has any reason to

were afterwards bought by the contractors, who reorganized the company and conveyed the property and franchises to the new company, the contractors and both companies were estopped from alleging any invalidity in the execution or delivery of the bonds, in the hands of assignees of the contractors, or want of power of the old company to issue them. *De Kay v. Voorhis*, 36 N. J. Eq. 37.

¹ *Burton v. Peterson*, 12 Phila. 397. But one who takes it for an antecedent debt due him from the broker or agent is not such a holder for value. *Burton v. Peterson*, 12 Phila. 397. Where, however, one takes stock in satisfaction of a

debt due him from the equitable owner thereof, the legal title to the stock being in another, the creditor becomes the *bona fide* purchaser of the stock, and will be protected as such. *Thurber v. Crump*, (1888) 86 Ky. 408.

² *Beach on Railways*, §§ 383, 384.

³ Stat. Mass. 1884, ch. 229; *Jones v. Atchison & Co. R. Co.*, (Mass. 1890) 23 N. E. Rep. 43.

⁴ *Brewster v. Sims*, 42 Cal. 139; *Albert v. Baltimore*, 2 Md. 159; *Thompson v. Toland*, 48 Cal. 99.

⁵ *Shaw v. Spencer*, 100 Mass. 382; *Jones v. Williams*, 24 Beav. 62; Article by Francis B. Patten, 18 Am. L. Rev. 975. See also on this subject: *Murray v. Feindur*, 12 Md.

suppose that his vendor is a trustee and, in selling the stock, is acting adversely to the interest of his *cestui que trust*, he becomes chargeable with knowledge of the breach of trust, and if he consummates the sale he becomes bound to restore the stock; for, in equity, he also becomes a trustee,¹ as an equitable title, superior to that of his *cestui que trust*, can not be created in another by a trustee.² While, generally, in such a case a *bona fide* purchaser from an agent will be protected,³ yet one who has notice that an agent is acting without authority deals with him at his own risk.⁴ With respect to guardians, there are sometimes statutes which prescribe that, before guardians can sell or transfer stock or other personal property belonging to their wards, authority to do so must be obtained from a court of competent jurisdiction.⁵ So that when a vendee is chargeable with knowledge of the fact that his vendor acts in the capacity of a guardian, he is put upon inquiry, and to escape loss in case of fraud must examine the authority to sell.⁶ A *bona fide* purchaser, however, will be protected even when he purchased at private sale, in the face of a statute requiring a sale at auction, it being held that such a statute is merely directory.⁷ When stock is so transferred before certificates are issued, and the original certificates are finally issued to the transferee, he is not entitled to the advantage of the position of a *bona fide* purchaser without notice, but stands in the place of an original holder.⁸ So

Ch. 418; *Powlet v. Hubert*, 1 Ves. 267; *Ward v. Kitchen*, 30 N. J. Eq. 31; *Bowker v. Pierce*, 130 Mass. 262; *Perry on Trusts*, (3rd ed.) § 225; *Lewin on Trusts*, (7th ed.) 417; *Merchants' Bank v. Livingston*, 74 N. Y. 223. Cf. *Ashton v. Atlantic Bank*, 85 Mass. 217.

¹ *Hollen's Estate*, 75 Pa. St. 312; *Jandon v. Nat. City Bank*, 8 Blatch. 430; s. c. 15 Wall. 165; *Bayard v. Farmers' &c. Bank*, 52 Pa. St. 232.

² *Shropshire Union &c. Co. v. Regina*, L. R. 7 H. L. 496.

³ *Otis v. Gardner*, (1883) 105 Ill. 436; *Gulick v. Markham*, (1875) 6 Daly, 129.

⁴ *Bank of Louisville v. Gray*, (Ky. 1886) 84 Ky. 565.

⁵ Mass. Rev. Stat. ch. 79, § 21; *Wallace v. Holmes*, 9 Blatch. 65.

⁶ *Atkinson v. Atkinson*, 90 Mass. 15. But an order authorizing a guardian to sell stock does not vest him with power to pledge it. *Webb v. Grandville Manuf. Co.*, 11 S. C. 396.

⁷ *Turite v. Stevens*, 98 Mass. 307.

⁸ *In re Vulcan Iron Works*, Law Times, 1885, p. 61; *Rowland's Case*, 42 L. T. N. S. 785; *Potter's Appeal*, Week. Notes, 1878, p. 81. *Contra*, *Carling's Case*, 1 Ch. Div. 115.

when a transferee of stock executes a paper purporting to be an original subscription and makes an agreement to pay assessments, he becomes an original stockholder liable for unpaid subscriptions.¹ But when the corporation has incurred a liability for an overvaluation of property received by it from original subscribers in payment of their subscriptions, the fact that original certificates are issued to *bona fide* purchasers of stock from the subscribers does not render them liable to the corporate creditors.² Neither the corporation nor the real owner of stock can compel the surrender of a new certificate by one who has purchased it in good faith.³

§ 666. (c) **Of bonds and coupons.**—As an example of the almost complete invulnerability of the *bona fide* holder's position with respect to corporate bonds, must be mentioned the exception in their behalf to the doctrine of *lis pendens*.⁴ This exception holds even though the paper was purchased during the pendency of a suit in which their issue was finally declared unconstitutional, the purchaser not being affected with notice thereof.⁵ But while the issuing and delivering of bonds voted by a municipal corporation under an alternative proposition to one named company or another also named would be enjoined if timely application was made, yet as, by the terms of the proposition, the commissioners were authorized to issue and deliver the bonds to the company which should build the road, and as they had complied with such apparent authority, their action in the premises was voidable, and not void; and the bonds were only liable to be set

¹ *Citizens' &c. Co. v. Gillespie*, 101 U. S. 687; *Douglass v. Pike County*, 101 U. S. 687; *County of Warren v. Marcy*, (1887) 97 U. S. 96; *City v. Lamson*, 9 Wall. 477. And if the law under which bonds were issued had been recognized as valid by the highest court of the State at the time of the purchase, no subsequent decision can affect their validity in the hands of *bona fide* purchasers for value. *Marshall v. Elgin*, (1881) 3 McCrary, 35; s. c. 8 Fed. Rep. 783, 787, 788; *City v. Lamson*, 9 Wall. 477; *Douglass v. Pike County*, 101 U. S. 687.

² *Young v. Erie Iron Co.*, (1887) 65 Mich. 111, citing *Sanger v. Upton*, 91 U. S. 56, 60; *Steady v. Little Rock &c. R. Co.*, 5 Dill. 348, 373-377.

³ *Machinists' National Bank v. Field*, 126 Mass. 345; *In re Bahia &c. Ry. Co.*, L. R. 3 Q. B. 584.

⁴ *County of Warren v. Marcy*, (1877) 97 U. S. 96.

⁵ *Lexington v. Butler*, 14 Wall. 283; *Marshall v. Elgin*, (1881) 3 McCrary, 35; s. c. 8 Fed. Rep. 783, 788; *Pike County*, 101 U. S. 687.

aside before they had passed into the hands of an innocent purchaser for value.¹ In the case of interest coupons the question has arisen whether one who advances money to a corporation to enable it to redeem them, can claim to be a *bona fide* purchaser to the extent of keeping alive their lien on the mortgaged property to secure the money advanced. This depends upon whether in taking up the coupons he acted independently or as an agent of the company, that is whether they were *purchased* or *paid*.² But it is not to be assumed,

¹North v. Platte County, (Neb. 1890) 45 N. W. Rep. 692. But it has been held that purchasers of bonds issued under an unconstitutional statute are chargeable with notice of their illegal origin. Duke v. Brown, (1887) 96 N. C. 127; Markham v. Manning, (1887) 96 N. C. 132. And if bonds be issued by the officers of a company to a party under a contract which amounted to a fraud upon the shareholders, a *bona fide* purchaser takes them subject to equities. Athenæum &c. Ins. Co. v. Pooley, 3 De Gex & J. 294. So also in a case in which the bonds of a railway company which had not been issued, were seized by soldiers in the war between the American States, and, together with overdue coupons attached, were negotiated at a very small price and under circumstances *prima facie* inconsistent with any view except a bad title, the purchasers could not sustain the position of *bona fide* holders without notice. Parsons v. Jackson, (1878) 99 U. S. 434. Cf. Jackson v. Ludeling, 99 U. S. 513; Rouede v. Jersey City, 18 Fed. Rep. 722.

²The lien of coupons upon the corporate property is terminated by their payment and can not be kept alive to secure one who advanced money to the company to enable it to pay them. Union Trust Co. v. Monticello &c. R. Co., 63 N. Y. 311;

s. c. 20 Am. Rep. 541. But if the holder presents the coupons at the regular depository of the corporation where money is lodged for their payment, and accepts a draft therefor, it is payment because the agent had only authority to make payment. People v. Cromwell, (1886) 102 N. Y. 477. And again the chief owner of the stock and bonds of a railroad company sold a majority of the stock and bonds, and afterwards pledged some of the bonds, subject to the contract, but gave the overdue coupons to his wife, thinking they would pass better with these off. Coupons on the bonds had never been paid, the bondholders and stockholders being the same, but were merely canceled. The purchaser sold his interests to complainant, and the former owner stated at the transfer that all coupons not canceled were with the bonds, and such was the understanding of all. On subsequent inquiry for missing coupons, the former owner stated that he sold the bonds with all the coupons of the date missing attached, but after two years the coupons given to the wife, which had apparently been forgotten, were discovered, and the husband tried to have them collected without disclosing their ownership, and made evasive statements as to them. And it was held, that the wife not being a *bona fide* purchaser,

when coupons are not paid in the usual manner, or at the usual place, or by the persons accustomed to pay them, that the transaction is intended to be a payment.¹ Accordingly one interested in a company may take up its coupons to save it from temporary difficulties and hold them against it under the original lien.²

§ 667. Forgery or fraud.—Neither forgery, theft nor fraud can confer power or convey title to stock. The corporation and its officers are trustees of the stockholders and are bound to protect their rights. They must therefore use extraordinary diligence in the examination of applications for transfers. When in doubt as to the genuineness of the application, they may even require the person in whose name the stock stands on the books to be present, and are in general entitled to satisfactory evidence of the regularity of the transfer.³ Whatever is done by the corporation or officers in such a case must be done in their discretion and upon their own responsibility, and therefore a corporation may maintain an action against a person who presents a forged power of attorney to transfer stock, upon the faith of which the corporation issues to him a new certificate of stock, although he acted in good faith.⁴ So where a forged transfer has been regis-

the coupons must be regarded as cancelled, and complainant was entitled to an injunction restraining collection thereof by her, and requiring them to be delivered up. *Chicago &c. Ry. Co. v. Turner*, (Mich. 1889) 44 N. W. Rep. 174; s. c. 7 Ry. & Corp. L. J. 188.

¹ *Ketchum v. Duncan*, (1877) 96 U. S. 662, saying: "There can be no payment of coupons without an intention to pay them." See also *Wood v. Guarantee &c. Co.*, (1888) 128 U. S. 416.

² *Ketchum v. Duncan*, (1877) 96 U. S. 665. Cf. *Claffin v. Railroad Co.*, 4 Hughes, 36.

³ *Telegraph Co. v. Davenport*, 97 U. S. 369; *Crocker v. Crocker*, 31 N. Y. 507; *Dovey's Appeal*, 97 Pa. St.

153; *Weaver v. Borden*, 49 N. Y. 286; *Moodie v. Seventh Nat. Bank*, 3 Week. Notes Cas. (Pa.) 118; *Tal-
mage v. Third Nat. Bank*, 91 N. Y. 531.

⁴ *Boston & Albany R. Co. v. Richardson*, 135 Mass. 473; *Davis v. Bank of England*, 2 Bing. 393; *Dalton v. Midland Ry. Co.*, 12 C. B. 458; *Coates v. London &c. Ry. Co.*, 41 L. T. N. S. 553; *Swan v. North British &c. Co.*, 7 H. & N. 603; *Johnston v. Renton*, L. R. 9 Eq. 181; *Midland Counties Ry. Co. v. Taylor*, 8 H. L. Cas. 751, affirming *Taylor v. Midland Ry. Co.*, 29 L. J. Ch. 731; *Sloman v. Bank of England*, 14 Sim. 475; *Cottam v. Eastern Counties Ry. Co.*, 1 J. & H. 243; *Ex parte Swan*, 7 C. B. N. S. 400; *Telegraph Co. v. Davenport*, 97

tered, the real owner of the stock has his remedy against the corporation either by a bill in equity to compel a re-transfer on the books, or by an action for damages.¹ He may force the issue of new certificates by the company.² Inas-

U. S. 369; *Pollock v. National Bank*, 7 N. Y. 274; *Day v. American Tel. & Co. Co.*, N. Y. Daily Reg. July 18th, 1885; *Pratt v. Boston & C. R. Co.*, 126 Mass. 443; *Pratt v. Taunton & C. Manuf. Co.*, 123 Mass. 110; *Mayor & C. of Baltimore v. Ketchum*, 57 Md. 123; *Machinists' National Bank v. Field*, 126 Mass. 345; *Loring v. Salisbury Mills Co.*, 125 Mass. 138; *Sewall v. Boston Water Power Co.*, 86 Mass. 277; *Blaisdell v. Bohr*, 68 Ga. 56.

¹ *Blaisdell v. Bohr*, 68 Ga. 56; *Pollock v. National Bank*, 7 N. Y. 274; *Cottam v. Eastern Counties Ry. Co.*, 1 J. & H. 243; *Midland Ry. Co. v. Taylor*, 8 H. L. Cas. 751; *Browne & Theobald's Ry. Law*, 71; *Swan v. North British & C. Co.*, 2 H. & C. 175; *Johnston v. Renton*, 9 Eq. 181; *Sloan v. Bank of England*, 14 Sim. 475.

² *Pollock v. National Bank*, 7 N. Y. 274; *Dalton v. Midland Ry. Co.*, 12 C. B. 458; *Blaisdell v. Bohr*, 68 Ga. 56. "It has been held in a case, the authority of which has never been judicially doubted (*In re Bahia & San Francisco Railway Co.*, 18 L. T. Rep. 467), and which, though it arose on a foreign railway case, is very hard to distinguish, that where the transferee who took by a forged transfer himself receives a certificate, and on the strength of that certificate becomes a transferrer, his transferee can call upon the company for a complete indemnity. The cases will be few indeed in which the stockholder will lose the value of his stock; but even a single case in which he loses it has (and quite naturally) so terrifying an effect upon the stockholders throughout the

country, and upon their bankers, solicitors and brokers, that the law of the subject and the question whether and how far it ought to be altered require instant and careful examination. . . . But is the Bahia case perfectly good law? We are rather inclined to doubt it. The ground of that decision was that the company, by giving a certificate, had enabled the transferees, under the forged transfer, to hold themselves out as real owners. Now, by section 12 of the Companies Clauses Act 1845, which applies to all railway companies incorporated in and after 1845, and is to a great extent similar to section 31 of the Companies Act 1862, on which the Bahia case was decided, it is enacted that 'the certificates shall be admitted in all courts as *prima facie* evidence of the title of the shareholder.' In the Bahia case the court held that the doctrine of *Freeman v. Cooke*, 2 Ex. 654, applied, and that the company was 'estopped.' But in *Swan v. North British Australasian Co.*, 2 H. & C. 188, Cockburn, C. J., observed: 'To bring a case within the principle established by the decision in *Freeman v. Cooke*, it is essentially necessary that the representation or conduct complained of, whether active or passive in its character, should have been intended to bring about the result whereby loss has been occasioned to the other party, or his position has been altered;' and the opinion of Blackburn, J., is to the same effect. Curiously enough, both these judges were parties to the judgment in the Bahia case, and saw no difficulty in applying the principle of *Freeman v. Cooke* to it.

much as a forged transfer can convey no title, the corporation is under no obligation to the transferee to recognize him as a stockholder. So where such a transfer was made and registered without knowledge on the part of the corporation of the forgery, it may cancel the registry and the transferee is without power to prevent it.¹ Although if the corporation makes the transfer by mistake it can not be held liable,² yet when a bank takes forged certificates in pledge from the forger, and he applies for a second loan, upon which the corporation insists upon a registration in its name, it becomes liable to the pledgee for the second loan but not for the first.³ But when one is not the immediate purchaser under a forged transfer but obtains the shares from one who is, he has his remedy against the latter under the implied warranty of title; even though the latter transferred the stock without knowledge of the forgery,⁴ except that when such a transfer is made through an agent, the agent incurs no liability.⁵ The immediate purchaser of forged certificates has no right to new certificates which have been issued to him upon the transfer, for the reason that they do not operate to divest the real owner of his title to the stock.⁶

§ 668. The Schuyler frauds.—A leading case upon this subject is that of *New York &c. R. Co. v. Schuyler*,⁷ in which

For ourselves, we submit with diffidence that there is considerable difficulty in so applying it; but, as we have already said, the *Bahia* case has never been judicially called in question; and it appears to have been approved of in *Hart v. Frontino &c. Company*, 22 L. T. Rep. N. S. 30. Be this as it may, however, it can not be said that the law is at present in a satisfactory state, as it seems clear at any rate that he who takes the first transfer of 'bad' stock must bear all the loss of a holder without title." 8 Ry. & Corp. L. J. 398.

¹ *Davis v. Bank of England*, 2 Bing. 393; *Hare v. London &c. Ry. Co.*, 2 Johns. & H. 480; s. c. 30 L. J. Ch. 817; *Waterhouse v. London &c.*

Ry. Co., 41 L. T. N. S. 553; *Simm v. Anglo-American Tel. Co.*, 5 Q. B. Div. 188; *Brown v. Howard Ins. Co.*, 42 Md. 384; *Hambleton v. Central &c. R. Co.*, 44 Md. 551; *Hildyard v. South Sea Co.*, 2 P. Wms. 76. Cf. *Ashby v. Blackwell*, 2 Eden, 299.

² *Waterhouse v. London &c. Ry. Co.*, 41 L. T. 553; *Simm v. Anglo-American Tel. Co.*, 5 Q. B. Div. 188.

³ *Metropolitan Savings Bank v. Mayor &c. of Baltimore*, 63 Md. 6.

⁴ *Matthews v. Massachusetts National Bank*, 1 Holmes, 396.

⁵ *Machinists' National Bank v. Field*, 126 Mass. 345.

⁶ *Johnston v. Renton*, (1870) L. R. 9 Eq. Cas. 181.

⁷ 34 N. Y. 30.

it is held that a transferee must be registered in order to be protected against a fraudulent transfer.¹ In this case Davis, J., said: "Where the stock of a corporation is, by the terms of its charter or by-laws, transferable only on its books, the purchaser who receives a certificate with power of attorney gets the entire title, legal and equitable, as between himself and his seller, with all the rights the latter possessed; but as between himself and the corporation he acquires only an equitable title which they are bound to recognize and permit to be ripened into a legal title, when he presents himself, before any effective transfer on the books has been made, to do the acts required by the charter and the by-laws in order to make a transfer. Until these acts be done he is not a stockholder and has no claim to act as such. . . . The stock not having passed by the delivery of the certificates and power of attorney, the legal title remains in the seller, so far as affects the company and subsequent *bona fide* purchasers who take by transfer duly made on the books. And hence a buyer in good faith, who takes a transfer in conformity to the charter and by-laws, permitted to be made by the authorized officer of the corporation, becomes vested with the complete title to the stock and cuts off all the rights and equities of the holder of the certificate to the *stock itself*."² Where, however, the transfer is made effectual by the surrender and cancellation of the old certificates, no valid transfer can be made without compliance with this formality.³ And where a transferee has waived the right to the cancellation of the old certificates and consents to a transfer on the books without their presence, he has no recourse against the corporation for damages.⁴

§ 669. Spurious stock.—The transferee of spurious or overissued shares may hold the transferrer liable for damages

¹ See also *Cady v. Potter*, 55 Barb. 463.

² *New York &c. R. Co. v. Schuyler*, 34 N. Y. 30, 80, citing *Wilson v. Little*, 2 Comst. 443, 447; s. c. 51 Am. Dec. 307; *Bank of Utica v. Smalley*, 2 Cow. 770; s. c. 14 Am. Dec. 526; *Stebbins v. Phoenix Fire Ins. Co.*, 3 Paige, 350; *Union Bank v. Laird*, 2 Wheat. 390; *Mechanics' Bank v.*

New York &c. R. Co., 3 Kern. 621; *Gilbert v. Manchester Iron Co.*, 11 Wend. 627; *Borgate v. Shortridge*, 31 Eng. L. & Eq. 58.

³ *Beach on Railways*, §§ 383, 384.

⁴ *Houston &c. Ry. Co. v. Van Alstyne*, 56 Tex. 439; *Hall v. Rose Hill &c. Road Co.*, 70 Ill. 673. Cf. *Shropshire &c. Ry. & Canal Co. v. Queen*, L. R. 7 H. L. 496.

upon proof that the latter was cognizant of the fraud.¹ But when knowledge of the fraud can not be proven against the vendor, the remedy of the transferee is against the corporate officers through whose fraud or negligence the certificates were issued, and against the company, against both jointly or either separately.² The transferee's claim upon the company is not upon the stock; but it is a claim to be indemnified for the fraudulent acts of the officers of the company from which he has suffered damages.³ Stock certificates issued by a corporation having power to issue are a continuing affirmation of the ownership of the special amount of stock by the person designated therein or his assignee, and the purchaser has a right to rely thereon and claim the benefit of an estoppel in his favor as against the corporation.⁴ "This being so, it will

¹ *Seizer v. Mali*, 41 N. Y. 619; *Bruff v. Mali*, 36 N. Y. 200; *Kendall v. Stone*, 5 N. Y. 14; *People's Bank v. Kurtz*, 99 Pa. St. 344; *State v. North Louisiana & C. Co.*, 34 La. Ann. 947; *Kempson v. Saunders*, 4 Bing. 5; *Gompertz v. Bartlett*, 2 El. & Bl. 849; *Nockles v. Crosby*, 3 Barn. & C. 814.

² *Henderson v. Railroad Co.*, 17 Tex. 560; s. c. 67 Am. Dec. 675, holding that the company should be made co-defendant if the action be against the officers; *Bruff v. Mali*, 36 N. Y. 200; *Ashmead v. Colby*, 26 Conn. 287; *State v. Jefferson & C. Co.*, 3 Humph. 305; *Waldo v. Chicago & C. R. Co.*, 14 Wis. 575; *Cargill v. Bower*, 10 Ch. Div. 502; *Venezuela Ry. Co. v. Kisch*, L. R. 2 H. L. 99; *Henderson v. Lacon*, L. R. 5 Eq. 249; *Askew's Case*, L. R. 9 Ch. 664; *Ross v. Estates & C. Co.*, L. R. 3 Ch. App. 682; *Smith v. Reese*, L. R. 2 Eq. 264; *Thorpe v. Hughes*, 3 Mylne & C. 742.

³ *Mount Holly Paper Co.'s Appeal*, 99 Pa. St. 513; *Appeal of Kisterbock*, (1889) 127 Pa. St. 601; s. c. 14 Am. St. Rep. 868, 871.

⁴ *Appeal of Kisterbock*, (1889) 127

Pa. St. 601; s. c. 14 Am. St. Rep. 868, 871, citing *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616; *Willis v. Derby Ry. Co.*, 6 W. N. C. (Pa.) 461; *Bank of Kentucky v. Bank*, 1 Pars. Cas. 180; *In re Bahia & San F. Ry. Co.*, L. R. 3 Q. B. 585. *Acc. Jarvis v. Manhattan Beach Co.*, (1889) 53 Hun. 362; s. c. 6 Ry. & Corp. L. J. 325, citing *Beach Co. v. Harvard*, 27 Fed. Rep. 484, and saying, in that case "the purchase had been made without any previous inquiry of the company, yet the court held that it was estopped by issuing a new certificate. By that act 'they not only re-affirmed the authenticity of the surrendered certificate, but recognized the defendants' title to the shares, and thereby authorized the defendants to repose without further inquiry upon the validity of the title they had acquired.' And the court further held that the company was estopped by its subsequent negligence in not discovering the fraud and notifying the defendants in time to enable them to seek restitution from the swindler. He paid his money upon the false representation, made by the certificate, that

be seen at once that the right to relief depends upon the equity of the person claiming it. If he has expended money upon the faith of the official certificates of the officers of the company, he has a right to be indemnified, to the extent of his

title could be acquired by a genuine assignment, when in truth a genuine assignment was impossible. The legal effect of such a certificate was substantially the same as if it had been issued to 'bearer.' Such is the rule with regard to bills put in circulation with a fictitious payee, *Coggill v. Bank*, 1 N. Y. 113; and the analogy is not strained when we consider, as was said by the learned judge in the *Harvard Case*, that 'shares of corporate certificates issued as evidence of the ownership of the shares are the *indicia* of title, and are treated as representing the shares themselves.' It is not necessary, however, to decide definitely whether the plaintiff could recover upon the representation made by the certificate standing alone, for this case differs from the *Harvard Case* in the crucial fact that Fox & Co. did not rely upon the certificate alone, but sought, as we have already seen, to make assurance 'doubly sure,' to quote the testimony, by inquiry of the defendant. In considering the effect of this inquiry, it must be remembered that the company had caused its stock to be listed on the Stock Exchange, and that it was aware of the requirement of a guaranty, in transactions between members of that body, not only of the genuineness of the certificate, but of the indorsement. It knew, too, that members of the board relied upon the company for information and invariably gave the guaranty upon the faith thereof. The company kept a record of its stockholders' signatures, and it was its duty to verify such signatures

when applied to for a transfer. It had also repeatedly assumed the duty of knowing and vouching for such signatures, when applied to for information as to the genuineness of a transfer. Indeed, such was the custom of Wall street, and the defendant was well aware that business was being transacted, and transfers made, upon the faith of the double inquiry, first, as to the genuineness of the certificate, and second, as to the genuineness of the transfer indorsed thereon. In the light of these surrounding circumstances, Fox & Co. presented the certificate at the defendant's general transfer office, and were informed, as already stated, that it was properly indorsed for transfer, and that the person in charge was willing to transfer it. The proximate cause of Fox & Co.'s inquiry was plainly this representation, coupled with the affirmation of the certificate. This was a re-affirmation of the validity of the certificate, of the reality of B. Bignell, and of the genuineness of the signature of that fictitious person to the transfer indorsed. It was made with full knowledge of the purpose of the inquiry, namely, that the stock might be safely purchased, and with the means directly at hand—in books lying before the agent—of discovering the fraud, and saving the innocent inquirer from loss. This is a plain case of estoppel, entitling the plaintiff to genuine stock, if that were possible, but that being impossible, entitling him, upon the defendant's repudiation of the certificate, to appropriate damages. The authority of the per-

expenditure, against loss from false certificates, but only because of the fact of his expenditure. The false certificates are no certificates in legal contemplation and give no rights of their own force. But the act of the officers in issuing them, having been accepted and acted upon by another, the company can not be heard to deny the truth of the fact represented. It is simply the application of the principle that if you make a representation with the intention that it shall be acted upon by another, and he does so, you are estopped from denying the truth of what you represent to be the fact."¹ It is said, however, to be a condition precedent to maintaining such an action for damages, that the holder of the overissued stock shall discharge any lien upon it which would have properly attached to genuine stock under like circumstances.²

§ 670. Lost or stolen certificates of stock.—The true owner of shares of stock from whom, without his fault or negligence, they have been stolen loses no right in them even as against one who, in good faith and for value, buys them from the thief, they having been regularly indorsed by a former

son who made these representations is questioned, but the evidence on that head was certainly sufficient to go to the jury. *Leslie v. Insurance Co.*, 63 N. Y. 34. And see *Dunn v. Insurance Co.*, 19 Week. Dig. 531. Indeed, there was testimony from which the presence of the defendant's treasurer, Mr. Moulton, might have been inferred, and that it was he who answered the inquiry. Fullerton was the transfer clerk, and he acted under Mr. Moulton's 'supervision and inspection.' The defendant's present secretary, Mr. McDonough, testified that at the time when the inquiry was made 'there was no other employee of the Manhattan Beach Company in the office with Mr. Fullerton except the treasurer, Mr. Moulton.' But even if it were not Mr. Moulton, the testimony was ample that it was at least an authorized person. Fox & Co. testified that this person was in charge of the

office, and was in the regular employ of the defendant. When Fullerton was out this person was in his place, and he had personally transferred stock for Fox & Co. and had had transactions with their clerk in regard to the transfer of certificates. This evidence being sufficient to go to the jury, the questions which the plaintiff asked to submit should, under the principle of the *Schuyler Case*, 34 N. Y. 30, have been submitted, and if answered in the affirmative, would have warranted a verdict for the amount received by Fox & Co. from the original purchaser, and paid over to Fullerton." *Barrett, J.*, in *Jarvis v. Manhattan Beach Co.*, (1889) 53 Hun, 362.

¹ *Appeal of Kisterbock*, (1889) 127 Pa. St. 601; s. c. 14 Am. St. Rep. 868, 871, 872.

² *Mt. Holly Paper Co.'s Appeal*, 99 Pa. St. 513.

owner, in whose name they stand on the corporation book.¹ It has likewise been held that even where the corporation was without fault and the stolen certificates were purchased in good faith, the real owner's rights would not be defeated.² But when such a transfer is registered, the parties to the registration being ignorant of the fact that it has been stolen, the innocent purchaser so registered is entitled to assert his right to the stock.³ Where one to whom certificates of stock were issued alleges that they have been lost, the corporation will not be compelled to issue new ones in lieu thereof without requiring him to give a bond of indemnity according to its by-laws, where the lapse of time since their alleged loss is not so great as to exclude danger of their re-appearance.⁴

§ 671. *The same subject continued.*—In New York the owner of lost or stolen certificates may compel the issue of new certificates, when the corporation refuses to do so, by petitioning the supreme court, which, upon due proof that the petitioner is the lawful owner, will make an order directing the corporation to issue the new certificates. The proceedings are had upon an order to show cause.⁵ In a recent case in Colorado⁶ it was said that certificates of stock are assignable, and pass from hand to hand by indorsement, as bills of exchange and promissory notes pass, a proposition which appears to be exactly the reverse of the law as stated in the authorities cited in the last section. It is qualified, however, by the further statement that an innocent purchaser for value will hold

¹ *Sherwood v. Meadow Valley &c. Co.*, 50 Cal. 412; *Brown v. Hartford Fire Ins. Co.*, 42 Md. 384; *Buffalo &c. Co. v. Alberger*, 22 Hun, 349; *Barstow v. Savage &c. Co.*, 64 Cal. 388; s. c. 49 Am. Rep. 705, substantially overruling *Winter v. Belmont &c. Co.*, 53 Cal. 428. *Cf.* *Anderson v. Nicholas*, 28 N. Y. 600; *Aull v. Colket*, 33 Leg. Intell. 44; *Biddle v. Bayard*, 13 Pa. St. 150.

² *Telegraph Co. v. Davenport*, 97 U. S. 369.

³ *Mandlebaum v. North American &c. Co.*, 4 Mich. 465. In one case

this was held even when the transferee had notice of the facts. *State v. New Orleans &c. Co.*, 25 La. Ann. 418.

⁴ *Guilford v. Western Union Tel. Co.*, (Minn. 1890) 46 N. W. Rep. 70; N. Y. Laws of 1890, ch. 564, § 51; *Galveston City Co. v. Sibley*, 56 Tex. 269. *Cf.* *Greenleaf v. Ludington*, 15 Wis. 558.

⁵ N. Y. Laws of 1890, ch. 564, §§ 50 and 51.

⁶ *Supply Ditch Co. v. Elliott*, (1887) 10 Col. 327; s. c. 3 Am. St. Rep. 586.

them against the true owner where the latter has placed it in the power of the assignor to perpetrate a fraud upon the innocent assignee. So qualified, it is probable that the proposition may be accepted as the law, and this view is further fortified by the fact that the case of *Lanier v. Bank*¹ is cited as authority, in which Justice Davis, who delivered the opinion of the court, said that certificates, "although neither in form or character negotiable paper, approximate to it as nearly as possible."² In a still more recent case in Alabama it is said that while certificates of stock are not negotiable instruments when indorsed in blank, they are nevertheless intended to pass from hand to hand by delivery; and a *bona fide* purchaser of certificates of stock, upon which a power of attorney, authorizing their transfer to any person, is indorsed by the person in whose name the certificates were issued, and who was the last registered stockholder, takes them relieved of a trust existing back of the registry, though the transfer to the purchaser is not registered.³

§ 672. Lost or stolen bonds.—Like commercial paper, coupon bonds are an exception to the rule that one can give no better title to personal property than he has himself.⁴ The rule of *caveat emptor* does not apply to negotiable bonds and coupons. One who purchases them for value, before maturity, in good faith and without gross negligence, acquires a good title, even as against a prior owner from whom they have been stolen, to the extent of the principal and of such of the interest coupons as have not matured.⁵ Mere negligence

¹ 11 Wall. 369.

² In *Mills v. Townsend*, 109 Mass. 115, it is said that while a transfer of shares by an assignment of the certificates can be effective only between the parties to the assignment, it has been held, in accordance with the usages of trade, that the indorsement of the certificates invests the assignee with the legal title to the interest so assigned as against all persons except the corporation. It was ruled that a *bona fide* purchaser, through *mesne* conveyances, starting

from a trustee who sells the stock in breach of trust, is protected.

³ *Winter v. Montgomery Gas Light Co.*, (1890) 8 Ry. & Corp. L. J. 244.

⁴ *Fifth Ward Sav. Bank v. First Nat. Bank*, (1887) 48 N. J. 513; *Carr v. Le Ferve*, 27 Pa. St. 413, holding that possession is *prima facie* evidence of ownership of securities of this character.

⁵ *Spooner v. Holmes*, (1869) 102 Mass. 503; s. c. 3 Am. Rep. 491; *Seybell v. National Currency Bank*, 2 Daly, 383; *Birdsall v. Russell*, 29

will not defeat the title of the purchaser. There must be either fraud or such negligence as amounts to fraud.¹ But when the ownership and theft of bonds of a negotiable character has been proven, the burden of proof is then upon the defendant to show the good faith of his purchase.² The purchaser is not affected with knowledge by a notice in a newspaper that bonds have been stolen, unless it be proven that he read it.³ And, again, mere notice that certain bonds have been stolen will not defeat the purchaser's title, where he either failed to remember the fact or where it was impracticable, from the multiplicity of his business dealings, to record or regard notices of that character.⁴ But there is no presumption in favor of a subsequent purchaser that the thief originally negotiated the bonds prior to maturity.⁵ Where, however, the original holder serves notice of the loss of bonds, with coupons attached, on the obligor, the latter may nevertheless pay the coupons to one presenting the paper and showing that he is an innocent holder.⁶

§ 673. Breach of trust — (a) In general.— A purchaser of stock in good faith and for a valuable consideration will take the stock as against the real owner although his vendor made

N. Y. 220; *Murray v. Lardner*, 2 Wall. 110; *Jones v. Nellis*, 41 Ill. 482; s. c. 89 Am. Dec. 389, annotated; *Arents v. Commonwealth*, 18 Gratt. 750; note to *Morris Canal &c. Co. v. Fisher*, 64 Am. Dec. 428, 435; *Evertson v. National Bank*, 66 N. Y. 14; s. c. 23 Am. Rep. 9; *Hotchkiss v. National Banks*, (1874) 21 Wall. 354; *National Bank v. Texas*, 20 Wall. 72; *Murray v. Lardner*, 2 Wall. 110; *Gilbough v. Norfolk &c. R. Co.*, 1 Hughes, 410.

¹ *Phelan v. Moss*, (1871) 67 Pa. St. 59; s. c. 5 Am. Rep. 402; *Seybell v. National Currency Bank*, 2 Daly, 383; *Snow v. Leatham*, 2 C. & P. 314; *Welch v. Sage*, 47 N. Y. 143; *Woodman v. Simons*, 20 How. 366; *Hamilton v. Vought*, 34 N. J. 187.

² *Northampton National Bank v. Kidder*, (1887) 106 N. Y. 221, 229;

s. c. 60 Am. Rep. 443; *Bank of New York v. Carll*, 55 N. Y. 440; *Farmers' National Bank v. Noxon*, 45 N. Y. 762; *Bank of Cortland v. Green*, 43 N. Y. 298.

³ *Raphael v. Bank*, 17 C. B. 161; *Hagen v. Bowery Bank*, 64 Barb. 197.

⁴ *Seybell v. National Currency Bank*, 2 Daly, 383; *Dinsmore v. Duncan*, 57 N. Y. 573; *Lord v. Wilkinson*, 56 Barb. 593; *Snow v. Leatham*, 2 C. & P. 314. But see *Vermilye v. Adams Express Co.*, (1874) 21 Wall. 138.

⁵ *Northampton National Bank v. Kidder*, (1887) 106 N. Y. 221, 229; s. c. 60 Am. Rep. 443; *Hinkley v. Merchants' Nat. Bank*, 131 Mass. 147.

⁶ *Bainbridge v. Louisville*, 83 Ky. 285, 289.

the sale to him in breach of a trust,¹ upon the ground that the legal title, by which a trustee holds the stock, is a title which can be transferred. And the delivery of certificates, indorsed in blank, being a sufficient performance of a contract to sell stock,² it follows that such a purchase in good faith and for value from a trustee will vest the title in the purchaser even though no record of the transfer has been made upon the corporate books.³ When stock is pledged, and the pledgee knows that the pledgor holds it in trust and lends it to secure a private debt, he enters into the transaction at his own risk, and may be obliged to surrender the stock to its rightful owner.⁴ A distinction is made between transfers by ordinary trustees who have no power to make transfers unless especially authorized to do so, and transfers by executors and administrators whose general powers include the power to dispose of securities by converting them into money for distribution. So where one purchases shares in good faith for a valuable consideration from an executor or administrator he is not called upon to examine the sources of his vendee's authority.⁵ The title of a *bona fide* transferee of stock that has been sold by an executor or administrator for his own benefit will be sustained;⁶ but where a long time has elapsed since the death of the testator or intestate, it may be evidence that neither the sale nor the purchase was made in good faith;⁷ so also where it is customary for executors or administrators to obtain permission from the court to sell stock, a failure to obtain permission may be a reflection on the character of the

¹ Briggs v. Massey, 42 L. T. 49; Salisbury Mills v. Townsend, 109 Mass. 115; Stinson v. Thornton, 56 Ga. 377; Holbrook v. New Jersey Zinc Co., 57 N. Y. 616; Cohen v. Graysen, 4 Md. Ch. 357; Sprague v. Chicago Manuf. Co., 10 Blatch. 173.

² Noyes v. Spaulding, 27 Vt. 420.

³ Johnson v. Laffin, 103 U. S. 800.

⁴ Shaw v. Spencer, 100 Mass. 382; Duncan v. Jandon, 15 Wall. 165; Loring v. Salisbury Mills, 125 Mass. 138; Loring v. Brodie, 134 Mass. 453; Sweeny v. Bank of Montreal, 5 Can. L. T. 503; Walsh v. Stille, 2 Par-

son's Select Cas. Eq. 270; Simmons v. Southwestern R. Co., 5 Rich. Eq. 270; White v. Price, 29 Hun, 394.

⁵ Leitch v. Wells, 48 N. Y. 585; Lowry v. Commercial &c. Bank, Taney, 310; Wood's Appeal, 92 Pa. St. 379; Clark v. South Metropolitan Gas Co., 54 L. J. Ch. 259; *In re London &c. Telegraph Co.*, L. R. 9 Eq. 633. *Cf.* Prall v. Tilt, 28 N. J. Eq. 479; s. c. 27 N. J. Eq. 393.

⁶ Keeney v. Globe Mill Co., 39 Conn. 145.

⁷ Lowry v. Commercial Bank, Taney, 310.

sale.¹ The same rule applies in the case of a pledge of stock by an executor or administrator.²

§ 674. (b) **The company's right to question transfers by trustees.**—The corporation has no power to interfere with the transfer of stock by the holder of the legal title upon the ground that it is a transfer by a guardian in fraud of the rights of his ward, for at common law a guardian has the right without the direction of the court to sell such personal property of the ward as he has in his possession and take proper care of the proceeds.³ And it is said that to recognize such a power in a corporation would unduly interfere with the nature of shares of stock by checking their circulation.⁴ Where a guardian has legal power to sell or dispose of the personal estate of his ward in any manner he may think most conducive to the purposes of his trust, a purchaser who deals fairly has a right to presume that he acts for the benefit of his ward, and is not bound to inquire into the state of the trust; nor is he responsible for the faithful application of the money, unless he knew, or had sufficient information, at the time, that the guardian contemplated a breach of trust, and intended to misapply the money, or was in fact, by the very transaction, applying it to his own private purpose.⁵ And it is no part of the duty of the corporation to inquire into the purposes of the parties, or to investigate the question whether the transaction is in good faith or is fraudulent.⁶ Accordingly, where there is no statute to the contrary, the corporation will be required to record a transfer of stock by a guardian upon due proof of his appointment. So, in the case of assignees in insolvency, the corporation can require no more evidence of the propriety of a transfer than the duly attested assignment.⁷

¹ *Lowry v. Commercial Bank*, Taney, 310; *White v. Price*, 39 Hun, 394; *Prall v. Hamil*, 28 N. J. Eq. 66.

² *Goodwin v. American National Bank*, 48 Conn. 550. Cf. *Crocker v. Old Colony R. Co.*, 137 Mass. 417.

³ *Lamar v. Micou*, 112 U. S. 452, 475; *Field v. Schieffelin*, 7 Johns. Ch. 154; s. c. 11 Am. Dec. 441.

⁴ *Bank of Virginia v. Craig*, 6 Leigh, 399, 432.

⁵ *Albert v. Bank*, 2 Md. 169; *Hutchins v. Bank*, 12 Metc. 421; *Ashton v. Bank*, 3 Allen, 222.

⁶ *Crocker v. Railroad Co.*, 137 Mass. 417; *Helm v. Swiggette*, 12 Ind. 195; *Brewster v. Lime*, 42 Cal. 143.

⁷ "The Rights and Duties of Corporations in Dealing with Stock held in a Fiduciary Capacity," by Francis B. Patten, 18 Am. Law Rev. 975, 978.

§ 675. (c) **The company's liability.**—So far as the corporation is concerned, it incurs no liability by reason of its registration of a transfer of stock by an executor or administrator nor is it under any obligation to investigate the object or intention of the transferrer,¹ except in cases in which it is chargeable with notice that the transfer is made for the benefit of the executor or administrator.² Where a corporation, upon the application of an administrator, transfers the shares standing in the name of his testator to him, the administrator not producing the certificate, if the transfer is unauthorized, the corporation is liable.³ It has been held that the corporation is chargeable with knowledge of the contents of a will,⁴ but, upon better authority, this is denied.⁵ Where, however, the time fixed by statute for the administration of an estate has passed and its affairs should be finally settled, the executor ceases to be an executor, except *sub illo nomine*, and assumes the duties of an ordinary trustee created subject to the terms of the will. The corporation, and parties dealing with him for a transfer of the shares, are then put upon inquiry, and in order to become entitled to protection in the future they must examine the terms of the will to determine his power to sell.⁶ And where an executor combines in his person the functions of an ordinary trustee with those of an executor, transfers of stock by him as trustee are subject to the rules regulating such transfers.⁷ The corporation is not bound to go back of the letters testamentary or letters of administration to determine the authority of an executor or administrator, and they will protect the corporation where it permits

¹ *Crocker v. Old Colony R. Co.*, 137 Mass. 417; *Goodwin v. American National Bank*, 48 Conn. 550; *Hutchins v. State Bank*, 53 Mass. 421; *Carter v. Manufacturers' National Bank*, 71 Me. 448.

² *Lowry v. Commercial &c. Bank*, Taney, 310.

³ *Brisbane v. Delaware, Lackawanna &c. R. Co.*, 25 Hun, 438.

⁴ *Stewart v. Firemen's Ins. Co.*, 53 Md. 564.

⁵ *Hutchins v. State Bank*, 53 Mass. 421.

⁶ *Lowry v. Commercial &c. Bank*, Taney, 310, 332; "The Rights and Duties of Corporations in Dealing with Stock held in a Fiduciary Capacity," by Francis B. Patten, 18 Am. Law Rev. 975, 977; *Bayard v. Farmers' &c. Bank*, 52 Pa. St. 236; *Petrie v. Clark*, 11 Serg. & R. 377; s. c. 14 Am. Dec. 636.

⁷ *White v. Price*, 39 Hun, 394; *Prall v. Tilt*, 28 N. J. Eq. 479; s. c. 27 N. J. Eq. 393.

registration.¹ But when a corporation has notice that a transferrer is acting as agent without power to sell, it becomes liable to the principal if it registers the transfer, even if the certificates in the agent's possession are indorsed in blank.²

§ 676. The same subject continued — The English rule. The question of responsibility for forged transfers of stocks has lately attracted attention in England. It is the custom of railway companies, when a deed of transfer is sent in for registration, to notify the registered holder whose stock it is proposed to transfer, that the deed has been deposited, giving at the same time the amount and description of stock and the purchaser's name, and stating that if the holder has executed the transfer no further notice need be taken of the information so conveyed. Failing any notification to the contrary, it is assumed that the deed of transfer is correct, and has been duly executed by the registered holder. So far as the company is concerned, this is all the precaution that can reasonably be expected. The attestation of the signature in the form required on every transfer is accepted as a guaranty of its genuineness by the purchaser, as well as by the company, who act as the mere agents for transferring the stock as registered in their books. At the half-yearly meetings of some of the railway companies, the shareholders present, by resolution, authorize the directors to affix the seal of the company to the register of shareholders, and by such act they adopt all the changes that may have been made to that date on the register of shareholders. If the registrar of the company makes the transfer required, and if the shareholders accept the transfer, the question arises, Who, in the event of forgery or other irregularity in the deed of transfer, is to be responsible?³ The London Stock

¹ Bayard v. Farmers' &c. Bank, 52 Pa. St. 235; Lowry v. Commercial &c. Bank, Taney, 310, 332; Field v. Schieffelin, 7 Johns. Ch. 155; Petrie v. Clark, 11 Serg. & R. 377; s. c. 14 Am. Dec. 636; Hutchins v. State Bank, 12 Met. 423; Keene v. Roberts, 4 Mad. Ch. 332.

² Woodhouse v. Crescent Mutual Ins. Co., 35 La. Ann. 238.

³ The Railway News, London, Oct. 25, 1890, where it is said further: "The London Stock Exchange Committee has expressed the opinion that certificates of stock should be made indefeasible. In support of the view that railway certificates should be indefeasible, Mr. Ernest L. Walford points out that, although in the Barton Case the amount of

Exchange Committee has, among its rules now in force, one to the effect that "the seller of shares of stock is responsible for the genuineness and regularity of all documents delivered, and for such dividends as may be received, until reasonable time has been allowed to the transferee to execute and duly lodge such documents for verification and registration."¹

§ 677. **Stock certificates not strictly negotiable.**—The weight of authority denies to certificates of stock the principal characteristics of negotiable instruments,² and it is denied that

North-Western Company's stock involved was only £1,000, the total amount involved in the various stocks forged was £40,000, and it is most melancholy to contemplate the extent of misery which these forgeries have caused. Among the stocks were some Scinde Railway annuities, the register of which is kept at the Bank of England. The Bank of England, however, replaced the stock, thus continuing to uphold their principle 'that registration in their books gives an indefeasible title.' Mr. Walford points out that 'during the last two years, Parliament, by means of the Trust Funds Investment Act, has authorized the transfer of these funds to various English railway securities. It is, therefore, incumbent on Parliament either to revise the Trust Funds Investment Act, striking out all English railway securities, or to insist that the companies shall give an indefeasible title.'

¹Stock Exchange Rules, No. 86. And it is added that "when an official certificate of registration of shares or stock has been issued, the committee will not (unless bad faith is alleged against the sellers) take cognizance of any subsequent dispute as to title until the legal issue has been decided, the reasonable expenses of which legal proceeding

shall be borne by the seller." It is plain that this rule requires very careful examination and revision. The expression "reasonable time," for instance, is very vague, and some express *prima facie* limitation of time should take its place. *Apropos*, by what authority do the companies exact indemnities from holders of stock who have lost their certificates before they will issue new ones? The Companies Clauses Act, 1845, section 13, simply enacts that "if a certificate be lost or destroyed, then, upon proof thereof to the satisfaction of the directors, a new certificate shall be given to the party entitled to the certificate so lost or destroyed." It is, we believe, the almost universal practice of companies to exact these indemnities, but whether any of them has ever been successfully sued on we can not say. We gravely doubt whether they would be supported in a court of law. The Law Times, Nov. 1, 1890.

²*Hawes v. Gas Consumers' Benefit Co.*, (1890) 9 N. Y. Supl. 490; *East Birmingham Land Co. v. Dennis*, (1889) 85 Ala. 565; s. c. 7 Am. St. Rep. 73; *Young v. South Tredegar Iron Co.*, (1887) 85 Tenn. 189; s. c. 4 Am. St. Rep. 752; *McNeil v. Tenth National Bank*, 46 N. Y. 325; *Mechanics' National Bank v. New York &c. R. Co.*, 13 N. Y. 599; *Cecil Na-*

commercial usage can clothe them with that character.¹ Accordingly an innocent purchaser for value of such a certificate, indorsed in blank by the owner, and stolen from him without negligence on his part, acquires no title thereto.² It is held that the *situs* of the corporation will determine the *situs* of the stock without regard to the location of the certificates for the purpose of giving jurisdiction for the attachment of the stock;³ and the assignee thereof takes them subject to all equities existing against the assignor.⁴ If the company transfers the shares to the indorsee of the certificate after notice of an adverse claim, it does so at its own peril.⁵ They are said to be of the nature of *quasi* negotiable instruments, mere evidences of ownership.⁶ Yet while not within the category of negotiable instruments as defined by the law merchant, yet, like warehouse receipts and bills of lading, they frequently convey as good a title as though they were actually negotiable.⁷ This title is grounded in estoppel.⁸

tional Bank v. Watsonstown, 105 U. S. 17; Pollard v. Vinton, 105 U. S. 5; Weaver v. Barden, 49 N. Y. 286, 288; Loeb v. Peters, 63 Ala. 243; Tiedman v. Knox, 53 Md. 612; Sewall v. Boston &c. Co., 86 Mass. 277; Barstow v. Savage &c. Co., 64 Cal. 391; Weyer v. Second National Bank, 57 Ind. 198, 208; Mandlebaum v. North American &c. Co., 4 Mich. 465, 473; Emery v. Irving National Bank, 25 Ohio St. 360.

¹ Shaw v. Spencer, 100 Mass. 382; Sherwood v. Meadow Valley &c. Co., 50 Cal. 417.

² East Birmingham Land Co. v. Dennis, (1889) 85 Ala. 565; s. c. 7 Am. St. Rep. 73.

³ Young v. South Tredegar Iron Co., (1887) 85 Tenn. 189; s. c. 4 Am. St. Rep. 752.

⁴ Young v. South Tredegar Iron Co., 85 Tenn. 189.

⁵ Hawes v. Gas Consumers' Benefit Co., (1890) 9 N. Y. Supl. 490.

⁶ Lanier v. Bank, 11 Wall. 369; Johnson v. Lafflin, 103 U. S. 800; Shaw v. Railroad Co., 101 U. S. 504;

McAllister v. Kuhn, 96 U. S. 89; Black v. Zacharie, 3 How. 483; Hubbell v. Drexel, 11 Fed. Rep. 115; Stollenwerck v. Thatcher, 115 Mass. 224; Shaw v. Spencer, 100 Mass. 382; Campbell v. Morgan, 4 Bradw. 100; Wood's Appeal, 92 Pa. St. 379; Finney's Appeal, 59 Pa. St. 598; Prall v. Tilt, 27 N. J. Eq. 393; Broadway Bank v. McElrath, 13 N. J. Eq. 24; First National Bank v. Northern R. Co., 58 N. H. 203; Burton v. Patterson, 12 Phila. 397; Conant v. Seneca County Bank, 1 Ohio St. 298.

⁷ McNeil v. Tenth National Bank, 46 N. Y. 325; New York &c. R. Co. v. Schuyler, 34 N. Y. 30; Mechanics' Bank v. New York &c. R. Co., 13 N. Y. 599; Weaver v. Bardin, 49 N. Y. 286; Ross v. South Western R. Co., 53 Ga. 514; First Nat. Bank v. Bryce, 78 Ky. 42; Strange v. Houston &c. R. Co., 53 Tex. 162; Duke v. Cahawba &c. Co., 10 Ala. 82; State v. North Louisiana R. Co., 34 La. Ann. 947; Smith v. Crescent City Co., 30 La. Ann. 378.

⁸ Vide *infra*, § 678.

§ 678. **Quasi-negotiability of stock grounded in estoppel.**—Although it is well established that certificates of stock are not negotiable, yet, where they have been assigned in blank with an irrevocable power of attorney, the rules of agency and estoppel are applied so as to give to the transaction practically the same effect as if it were a transfer of commercial paper, for it is held that where such an assignment in blank has been made it amounts to a representation that any *bona fide* purchaser for value will acquire good title, and that the person to whom it is delivered is either his assignee or his agent. It offers an inducement to purchasers, and the assignor will be estopped from repudiating the consequences of his act.¹ Under some conditions simple delivery, without indorsement of any kind, operates as an equitable assignment, and intervening equities will be defeated.² So when executors put it in the power of one of their number to dispose of stock belonging to their testator's estate, and he pledges it to secure his personal indebtedness, accompanied by an irrevocable power of attorney, it is, if it passes into the hands of a third party, presumptive evidence of ownership, and when all the *indicia* of ownership have thus been conveyed by one executor, they are all estopped from asserting title to the stock as against one who has purchased it in good faith and for value. It is upon this principle that the rights of a *bona fide* holder rest and not upon the negotiability of the certificates.³ Under this application of the rule of estoppel the title of an innocent purchaser of the stock for

¹ McNeil v. Tenth National Bank, N. Y. 211; Walsh v. Sexton, 55 46 N. Y. 325; Rumball v. Metropolitan Bank, 2 Q. B. Div. 194; Honold v. Meyer, 36 La. Ann. 585; Strange v. Houston &c. R. Co., 53 Tex. 162; Dovey's Appeal, 97 Pa. St. 153. Cf. State Bank v. Cox, 11 Rich. Eq. 344; Gulick v. Markham, 6 Daly, 129; West &c. Co.'s Appeal, 81 Pa. St. 19; Otis v. Gardner, 105 Ill. 436; Martin v. Sedgwick, 9 Beav. 333. *Contra*: As to the English rule see Taylor v. Great &c. Ry. Co., 4 De Gex & J. 559; Donaldson v. Gillot, L. R. 3 Eq. 274.

² Burrall v. Bushwick R. Co., 75

³ Wood v. Smith, 92 Pa. St. 379; Moore v. Metropolitan Nat. Bank, 55 N. Y. 41; Matthews v. Massachusetts National Bank, 1 Holmes, 396; Fatman v. Lobach, 1 Duer, 354; Mount Holly &c. Co. v. Ferrie, 17 N. J. Eq. 117; Walker v. Detroit Transit Ry. Co., 47 Mich. 338, 347; *Ex parte* Sargent, L. R. 17 Eq. 273; Rumball v. Metropolitan Bank, 2 Q. B. Div. 194. Cf. Briggs v. Massey, 42 L. T. 49.

value comes through the acts of the real owner, which make it possible for any one to purchase the certificates in the belief that his vendor is vested with title and authority to make a valid and effective sale, and do not depend upon the rights of the apparent owner in any degree.¹ This doctrine has been so extended that a *bona fide* purchaser of stock for value is protected by estoppel in almost every case in which he would be as the holder of a negotiable instrument. Thus if certificates of stock are transferred with the assignment indorsed in blank, and with an irrevocable power of attorney to have the transfer recorded on the books of the company, it invests them with the character of negotiable paper as nearly as can be done,² for any *bona fide* holder for value may then fill in the blanks, over the signature of the assignor, with his own name as assignee and as attorney, or with the name of any one as agent and attorney to have the transfer recorded on the corporate books;³ and the person so authorized by the indorsement of the certificates may make the demand upon the company for the issue of new certificates to the assignee so denominated.⁴ A certificate indorsed in blank may pass through a series of hands in the course of business with the blanks unfilled, and each *bona fide* holder into whose possession it comes may fill the blanks in the manner indicated, and in pursuance of the power require the corporation to register the transfer, either himself or through such agent as he may designate.⁵ Such a power of attorney is not revoked by the

¹ McNeil v. Tenth Nat. Bank, 46 N. Y. 325.

² Duke v. Cahawba &c. Co., 10 Ala. 82; s. c. 44 Am. Dec. 472; Lanier v. Bank, 11 Wall. 369, 377; McNeil v. Tenth National Bank, 46 N. Y. 325; Leitch v. Wells, 48 N. Y. 585, 613; Tome v. Parkersburgh R. Co., 39 Md. 36; Bridgeport Bank v. New York &c. R. Co., 30 Conn. 231, 275; Wood's Appeal, 92 Pa. St. 379; Wood's Ry. Law, § 95.

³ Cutting v. Damerel, 88 N. Y. 410; Holbrook v. New Jersey Zinc Co., 57 N. Y. 616, 623; Kortright v. Buffalo &c. Bank, 20 Wend. 91; Pennsylvania R. Co.'s Appeal, 86 Pa. St.

80; Matthews v. Massachusetts Nat. Bank, 1 Holmes, 396; Bridgeport Bank v. New York &c. R. Co., 30 Conn. 231; Broadway Bank v. McElrath, 13 N. J. Eq. 24; Walker v. Detroit Transit Ry. Co., 47 Mich. 338; Ortigosa v. Brown, 47 L. J. Ch. 168; *Ex parte* Sargent, L. R. 17 Eq. 273; *In re* Barned's Banking Co., L. R. 3 Ch. 105.

⁴ Commercial Bank v. Kortright, 22 Wend. 348; Dunn v. Commercial Bank, 11 Barb. 580; Bridgeport Bank v. New York &c. R. Co., 30 Conn. 231.

⁵ Kortright v. Buffalo &c. Bank, 20 Wend. 91; affirmed in 22 Wend. 348; Leavitt v. Fisher, 4 Duer, 1.

death of the person who executed it.¹ One who sells certificates of corporate stock does not thereby impliedly warrant that the company by which they were issued is a corporation *de jure*. It is sufficient, so far as any implied warranty is concerned, if they are issued by a corporation *de facto*.²

§ 679. **Transfer by power of attorney not indorsed on the certificate.**—The lack of the owner's indorsement on the certificate is not inconsistent with the right of the attorney to cause the stock to be transferred to himself. The neglect of the officers to require an indorsement of the certificate is only non-feasance, and is no evidence of conversion. It is not the duty of the officers of a corporation to inquire into the motives of an attorney in fact, having full power to transfer stock, for desiring it to be transferred to himself. So if the attorney in fact of a stockholder presents the certificate of stock, together with a power of attorney from the stockholder giving him full authority to deal with the shares, and the corporate officers are ignorant of any intention on the part of the attorney to misappropriate the stock, the corporation will not be guilty of conversion simply by issuing another certificate in the name of the attorney, who wrongfully appropriates the shares. The fact that the attorney was also a director of the corporation does not warrant the presumption that it had notice of his intention to convert the stock to his own use, as he assumed to act not for the corporation, but for his principal.³ The possession of a certificate of stock, together with a power of attorney to transfer it, even if the latter is not indorsed upon the certificate, is *prima facie* evidence of an equitable assignment at least.⁴

§ 680. **Of the registered transferee.**—Though the failure to have stock certificates surrendered and cancelled upon a

¹ Leavitt v. Fisher, 4 Duer, 1.

² Harter v. Elzroth (1887), 111 Ind. 159.

³ Taft v. Presidio & Ferries R. Co., (1889) 84 Cal. 131; s. c. 7 Ry. & Corp. L. J. 33.

⁴ Colt v. Ives, 31 Conn. 25; Trust

Co. v. Able, 48 Mo. 136; Bank v. McElrath, 13 N. J. Eq. 26; Scripture v. Soapstone Co., 5 N. H. 571; Baldwin v. Canfield, 26 Minn. 43; Bank v. Cox, 11 Rich. Eq. 347; Lowell on Transfer of Stocks, §§ 43, 44.

transfer on the corporate books does not necessarily render the title of the transferee incomplete, the transfer upon the books being sufficient to vest the title in a *bona fide* transferee,¹ yet he may insist upon the production and cancellation of the certificates.² When, therefore, a corporation has finally permitted the transfer on its books, it will not thereafter be permitted to set it aside on the ground that the legal title of the transferee is not perfect, and he may enforce his right to have his name appear as a stockholder on the official records of the corporation.³ But where stock is assigned and a certificate is obtained by the transferee from the company, upon whose books the transaction is properly entered, and the same stock is subsequently assigned to a third party, who also obtains a certificate, which, by an oversight on the part of the secretary, is issued, the second transferee acquires neither a legal nor an equitable title to the stock;⁴ although, if he were a *bona fide*

¹ *Baker v. Wasson*, 53 Tex. 150, 156; citing *New York &c. R. Co. v. Schuyler*, 34 N. Y. 30, 80.

² *Boatmen's Ins. &c. Co. v. Able*, 48 Mo. 136.

³ *Cady v. Potter*, 55 Barb. 463; *Ward v. South Eastern Ry. Co.*, 2 El. & E. 812. When a certificate of stock is transferred as collateral with power of attorney indorsed, the holder of the certificate is the only person entitled to make the transfer on the books, and a sale of the original owner's interest under an attachment in an action against him, after the delivery, passes no title, and the corporation has no power to make a transfer under the sale; if it does it is liable. *Smith v. American Coal Co.*, (1873) 7 Lans. 317; *Smith v. Crescent City &c. Co.*, 30 La. Ann. 1378. So that a transferee who has been registered but has been unable to obtain the certificates must, in order to obtain title, either attach the stock or enjoin his vendor from transferring the certificates. *Quarl v. Abbett*, (1886) 102 Ind. 233. This is the only method in which the rights

of such a transferee to the stock can be preserved, for a notice to the corporation is of no avail. So in a case where a guardian is sued by sureties to prevent a transfer of stock by him, the filing of a suit is not effective as a notice to the corporation to refuse to permit a transfer by the defendant. *Bank of Virginia v. Craig*, 6 Leigh, 399. *Cf. Dovey's Appeal*, 97 Pa. St. 153. Likewise one to whom stock is transferred by the defendant in an action in which the title to stock is involved can not be made chargeable with notice of the action. *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616; *Leitch v. Wells*, 48 N. Y. 586. But a transfer by a defendant after judgment is obtained, will be ineffectual to pass the title of the stock and the rights of the plaintiff and the corporation will be unimpaired. *Sprague v. Cocheco Manuf. Co.*, (1872) 10 Blatch. 173.

⁴ *Houston & Texas Central Ry. Co. v. Van Alstyne*, 56 Tex. 439; *Smith v. North American &c. Co.*, 1 Nev. 423.

purchaser, and the sale to him had been made upon false representations of the company or its officers, he might have a remedy.¹ When a transferee has had the transaction properly recorded by the company, and is without notice of the previous sale of the certificates, he is not liable.² And a *bona fide* purchaser for value of stock standing in the name of his vendor on the books of the company does not hold it subject to equities of third persons of which he had no notice.³

§ 681. **The same subject continued.**—When a transfer is made for the purpose of collateral security without surrender of the certificate and transfer on the books as required by a statute, the corporation can not, on the ground that it has a lien on the stock, which is prohibited by the statute, refuse to make the proper transfer of the stock without making itself liable to the assignee in damages for the conversion of the stock.⁴ In Colorado it has been held that the title to stock can pass, under the laws of that State, as against creditors of the stockholders, only by transfer upon the books of the company. So where stock, which is purchased but not so transferred by the purchaser, is subsequently sold in attachment proceedings by a creditor of the vendor, the title to the stock passes to the purchaser in the attachment proceedings.⁵ An unrecorded transfer of corporate stock prevails, in Massachusetts, as against the attachment of one having knowledge or notice of the transfer.⁶ The surrender of the old shares should be demanded even when the transferee is the purchaser of the stock at an execution sale.⁷ And when an assignee takes cer-

¹ *Houston &c. Ry. Co. v. Van Alstyne*, 56 Tex. 439.

² *Baker v. Wasson*, 53 Tex. 150.

³ *Caulkins v. Gas L. Co.*, 85 Tenn. 633; s. c. 4 Am. St. Rep. 786. Cf. *Supply Ditch Co. v. Elliot*, 10 Colo. 327; s. c. 3 Am. St. Rep. 586.

⁴ *Nicollet National Bank v. City Bank*, (1887) 38 Minn. 85.

⁵ *Conway v. John*, (Colo. 1890) 7 Ry. & Corp. L. J. 437.

⁶ *Bridgewater Iron Co. v. Lissberger*, 116 U. S. 8; *Telford & F. Co. v. Gerhab*, (Mass. 1888) 13 Atlan. Rep.

90. Cf. *Van Cise v. Merchants' Nat. Bank*, (Dak. 1887) 33 N. W. Rep. 897; *Thurber v. Crump*, (1888) 86 Ky. 408; *Bates v. New York Ins. Co.*, 3 Johns. Cas. 238.

⁷ *Hazard v. National Exchange Bank*, 26 Fed. Rep. 94; *Smith v. American Coal Co.*, 7 Lans. 317. Cf. *St. Louis &c. R. Co. v. Wilson*, 114 U. S. 60; *Rogers v. Stevens*, 8 N. J. Eq. 167. And when stock was purchased subsequent to an attachment levy, the title did not pass superior to that acquired by the pur-

tificates of stock upon which conditions affecting the title thereof are printed, he takes it under a title subordinate to that of the corporation under those conditions when he allows the corporation to perform certain acts in pursuance of the conditions and in ignorance of the transfer.¹ Where the legal title to shares of stock is only assignable on the books of the corporation, an assignment not made or recorded on the books is not valid.² No record on the books of the company

chaser at the attachment sale, even when negotiations for the purchase were had before the writ was issued, and at the time of the assignment of the stock neither the vendor nor vendee had any actual notice of the levy. *Young v. South Tredegar Iron Co.*, 87 Tenn. 169; s. c. 4 Am. St. Rep. 752. If the attachment is made and the stock levied on before a transfer of the stock, the corporation can not refuse to make a transfer on its books and issue a certificate to the purchaser at a sale in execution of the judgment on the ground that the stock had been assigned to a third party before judgment. *Morehead v. Western &c. R. Co.*, 96 N. C. 362. In an action by the purchaser, under attachment and execution, of shares of a railroad company, to compel the corporation to transfer to him, upon the stock-books of the company, the shares so purchased, and to execute the proper certificate, it is no defense on the part of the company, that, prior to the judgment under which the stock was sold, the stock had been duly assigned to a third party, there being no allegation or evidence that the assignment was made prior to the attachment levy. *Morehead v. Western N. C. R. Co.*, (1887) 96 N. C. 362. Yet, when the stock purchased at an execution sale was transferred by the direction of the court after a trial and the decision of the court of last resort without the cancellation of

the certificate, the corporation is not liable to the holder of the outstanding certificate who took no pains to protect himself. *Friedlander v. Slaughter-House Co.*, 31 La. Ann. 523; *National Bank v. Lake Shore &c. R. Co.*, 21 Ohio St. 221. Cf. *State v. Warren &c. Co.*, 32 N. J. 439; *Chapman v. New Orleans &c. Co.*, 4 La. Ann. 153. When, however, the court commanded the defendant corporation to cancel, to a certain extent and amount, a stock certificate which it had previously issued to one H., in which was a statement as to ownership and transfer, and in lieu thereof to issue another certificate to the plaintiff, the court having jurisdiction of the defendant corporation and the defendant H., but not having possession of the certificate which it attempted to cancel, it was held that the decree was erroneous. *Joslyn v. St. Paul Distilling Co.*, (Minn. 1890) 8 Ry. & Corp. L. J. 332.

¹ *Jennings v. Bank of California*, (1889) 79 Cal. 323; s. c. 12 Am. St. Rep. 145.

² *Lippitt v. American Wood Paper Co.*, (1885) 15 R. I. 141; s. c. 2 Am. St. Rep. 886. By the terms of a stock certificate, it was transferable upon the books of the corporation only upon its production. B., the owner of the certificate, transferred it to A. No transfer was made on the books. After B.'s death his administrator represented that the cer-

is required, however, to perfect the transfer of stock unless so provided by the charter and by-laws of the corporation.¹

§ 682. Of the unregistered transferee of the certificate.

A corporation is ordinarily justified in treating the assignee or holder of stock certificates as the legal or equitable owner thereof.² The company is trustee for the stockholders and is bound to protect their interest,³ and having the power, upon the demand of an alleged assignee of its stock to have a transfer on the books made, to ascertain who this owner is by requiring the production of the certificate, it is liable to the real holder of the certificate; and the title of the transferee upon the books is not affected by the non-cancellation of the old certificate.⁴ And therefore the transfer of stock on the books without the presence of the original certificate, is made at the peril of the corporation.⁵ So that, upon stock so issued

tificate was lost, and the corporation thereupon issued a new one to him, made a transfer on its books and paid to him dividends, and it was held that, notwithstanding, A. could compel the issue of a certificate to himself, but that the dividends were properly paid to B.'s administrator, as no rule required the production of a certificate upon making a demand for dividends. *Brisbane v. Delaware, L. & W. R. Co.*, 94 N. Y. 204.

¹ *Sayles v. Bates*, 15 R. I. 342.

² *Supply Ditch Co. v. Elliott*, (1887) 10 Colo. 327; s. c. 3 Am. St. Rep. 586.

³ *Supply Ditch Co. v. Elliott*, (1887) 10 Colo. 327; s. c. 3 Am. St. Rep. 586; *New York & C. R. Co. v. Schuyler*, 34 N. Y. 30, 81; *Moores v. Citizens' National Bank*, 111 U. S. 156; *Bank v. Lanier*, 11 Wall. 369; *Brisbane v. Delaware, L. & W. R. Co.*, 94 N. Y. 204; *Cushman v. Thayer Manuf. Co.*, 76 N. Y. 365; s. c. 32 Am. Rep. 315.

⁴ *New York & C. R. Co. v. Schuyler*, 34 N. Y. 30, 81; *Pollock v. National*

Bank, 7 N. Y. 274; s. c. 57 Am. Dec. 520; *Davis v. Bank of England*, 2 Bing. 397; *Ashby v. Blackwell*, 2 Eden, Ch. 299. A by-law providing that stock can only be transferred on surrender of the certificate to the president or secretary, who shall write "cancelled" thereon before issuing a new certificate, was held merely intended to protect the interests of the corporation. A delivery of a certificate by A. to B., without transfer on the books, as collateral security, with A.'s name signed thereon to a blank transfer, is valid as against C., an attaching creditor of A., and, on garnishment thereof, the court may order the shares to be sold, and the proceeds paid first to B., to the extent of his debt, and the surplus, if any, to be applied to C.'s judgment. *Seeligson v. Brown*, 61 Tex. 114.

⁵ *Supply Ditch Co. v. Elliott*, (1887) 10 Colo. 327; s. c. 3 Am. St. Rep. 586; *State v. New Orleans & C. R. Co.*, 30 La. Ann. 308; *Smith v. Crescent City & C. Co.*, 30 La. Ann. 378; *Strange v. Houston & C. R. Co.* 53

by wrong or mistake, the corporation is liable to a *bona fide* holder of the certificate.¹ The stock thus receives a character of negotiability.²

§ 683. **The same subject continued.**—“When the original stockholder, to whom such a certificate has been issued, comes to the corporation to transfer the stock, its books are notice to it that the certificate has been issued. The by-laws and the certificate are notice that it must be surrendered before the stock can be transferred, and its non-production is notice that it is not in possession of the party claiming the transfer. These facts operate as notice that some other party is its owner, and they put the corporation upon inquiry that would lead ordinary sagacity to the truth; and this is equivalent in equity to actual notice of all the rights that inquiry might develop.”³

Tex. 162; Bridgeport Bank v. New York & C. R. Co., 30 Conn. 231; Cleveland & C. R. Co. v. Robbins, 35 Ohio St. 483. Cf. Hart v. Frontino & Co., L. R. 5 Ex. 111. *Contra*, Shropshire & C. Ry. & Canal Co. v. Queen, L. R. 7 H. L. 496, 509; Houston & C. Ry. Co. v. Van Alstyne, 56 Tex. 439; Hall v. Rose Hill & C. Road Co., 70 Ill. 673. Especially where the certificate contains the statement that transfers will be made upon the books of the company upon the surrender and cancellation of the certificate, it is an assurance on the part of the company that stock will be transferred only to those in possession of the certificate. Lanier v. First National Bank, 11 Wall. 377; Brisbane v. Delaware, L. & W. R. Co., 94 N. Y. 204; s. c. 25 Hun, 438.

¹ Supply Ditch Co. v. Elliott, (1887) 10 Colo. 327; s. c. 3 Am. St. Rep. 586, holding that a *bona fide* purchaser of certificates of stock will hold them against the true owner, where the latter placed it in the power of the assignor to perpetrate a fraud on an innocent purchaser. The real owner of stock transferred by the carelessness of the cor-

poration, where certificates have been issued therefor, may compel the corporation to replace the stock or pay the value of it. He is not confined to a remedy against the transferee. St. Romes v. Cotton Press Co., 127 U. S. 614; Loring v. Frue, 104 U. S. 223; Telegraph Co. v. Davenport, 97 U. S. 369; Loring v. Salisbury Mills, 125 Mass. 138; Pratt v. Taunton Copper Co., 123 Mass. 110; Pratt v. Boston & C. R. Co., 126 Mass. 443; Salisbury Mills v. Townsend, 109 Mass. 115; Pennsylvania R. Co.'s Appeal, 86 Pa. St. 80; American Telegraph & C. Co. v. Day, 52 N. Y. Super. Ct. Rep. 128; Mayor & C. of Baltimore v. Ketchum, 57 Md. 23.

² Factors' & C. Ins. Co. v. Marine & C. Co., 31 La. Ann. 149.

³ New York & C. R. Co. v. Schuyler, 34 N. Y. 30, 83; Kortright v. Buffalo Commercial Bank, 20 Wend. 91; Bridgeport Bank v. New York & C. R. Co., 30 Conn. 270; King v. Bank of England, Dougl. 523. So if the owner of certificates of stock sells part of his holding and executes an assignment by filling up part of the blank form on the back

A purchaser, in good faith, of certificates of stock which a corporation has transferred on its books without the surrender and cancellation thereof, when the certificate and by-laws state that transfers will be made only upon such surrender, has his remedy against the corporation or the officer responsible for the improper transfer;¹ though if such a transfer is directed by a court of competent jurisdiction there will be no such liability.² As between the parties, by an assignment of the stock certificates, even though the transfer be not consummated upon the books of the company, the transferrer's title is cut off and he is estopped from claiming any title as against anybody.³ Thus a transfer of stock unrecorded on the books of the company, made with blank assignment and power of attorney to transfer on the books, gives a pledgee of the transferee, without knowledge of the rights of the original holder,

of the certificate, the fact that the assignment is so altered afterward as to make it appear that he assigns all his stock, will not relieve the corporation from liability for carelessness in permitting the transfer to be made. *Sewall v. Boston &c. Co.*, (1862) 86 Mass. 277; *Coles v. Bank of England*, 10 Ad. & E. 437. Thus, where a forged transfer has been made by a member of a firm, as one of the firm's transactions, the firm becomes liable for the value of the stock and dividends which may be recovered in an action for money had and received. *Marsh v. Keating*, 1 Bing. New Cases, 198; *Marsh v. Stone*, 6 B. & C. 551. Likewise when a person owning shares in two companies gives one address to one and another to the other and deposits the certificates with a person at one of the addresses, and the latter forges a transfer of the shares, and the companies make the transfer after communicating with him and receiving an answer from the forger, the companies must replace the stock; although in an action to enforce the right the plaintiff is not entitled

to costs. *Johnston v. Renton*, (1870) L. R. 9 Eq. Cas. 181; *Taylor v. Great Indian &c. Ry. Co.*, (1859) 4 De G. & J. 559; *Coles v. Bank of England*, 10 Ad. & E. 437; *Donaldson v. Gillot*, 3 Eq. 274; *McKenzie v. British Linen Co.*, 6 App. Cas. 82; *Swan v. North British &c. Co.*, 2 H. & C. 175; *Davis v. Bank of England*, 2 Bing. 393; *Bank of Ireland v. Evans' Charities*, 5 H. L. 389. And a ward is protected from the negligence of his guardian in allowing the registration of a forged transfer. *Telegraph Co. v. Davenport*, 97 U. S. 369.

¹ *Baker v. Wasson*, 59 Tex. 140.

² *Friedlander v. Slaughter-House Co.*, 31 La. Ann. 523.

³ *Duke v. Cahawba Navigation Co.*, 10 Ala. 82; s. c. 41 Am. Dec. 472; *Cushman v. Thayer*, 76 N. Y. 365; s. c. 32 Am. Rep. 315; *Baltimore &c. Ry. Co. v. Sewall*, 35 Md. 238; *Hall v. United States Ins. Co.*, 5 Gill, 484; *Gilbert v. Manchester &c. Co.*, 11 Wend. 627; *Brown v. Smith*, 122 Mass. 589; *Beckwith v. Burroughs*, 13 R. I. 294; *Bank of America v. McNeil*, 10 Bush, 54; *People's Bank v. Gridley*, 91 Ill. 457.

an equitable title.¹ If the corporation refuses to make the transfer on the books, the vendor is liable on the implied guaranty in his contract that the corporation will permit the transfer;² and the vendee's title to the stock and the dividends thereon will not be affected as between him and the vendor by the corporation's refusal;³ although if the vendor dies and his administrator receives dividends on the stock before the transfer is made on the corporate books, the corporation is not liable to the vendee, no presentation of a certificate being necessary upon a demand for dividends by the owner of record of the stock or his personal representative.⁴ If scrip representing stock be stolen by means of the forgery of the true owner's name, and the stock transferred on the company's books, a bill will lie to compel the issue of new stock to the true owner and the accounting for dividends by the company, or in default thereof to compel the purchasers of the forged certificates to replace the stock.⁵ The person whose rights have been jeopardized by a forged transfer may lose his rights by his own negligence; the omission on his part must be material, however, and must be the failure to perform some

¹ *Otis v. Gardner*, 105 Ill. 436; *Holyoke Bank v. Goodman & Co.*, 9 Cush. 576; *Chew v. Bank of Baltimore*, 14 Md. 299; *Home Stock Ins. Co. v. Sherwood*, 72 Mo. 461; *Cheltenham & Co. Ry. Co. v. Daniel*, 2 Q. B. 281; *Sheffield & Co. Ry. Co. v. Woodcock*, 7 Mees. & W. 574. In *Cherry v. Frost*, 7 Lea, 1, A. assigned to B., as collateral security for a loan, a stock certificate accompanied by a blank power of attorney to transfer the stock on the books of the corporation. B. sub-pledged the certificate to secure a loan from C., who had no knowledge of A.'s interest, but supposed the stock to be B.'s property. At the time of the loan from C. to B. no transfer had been made on the books of the corporation, and it was held that, as between A. and C., C. had the better equity and could hold the stock for the amount of his advances to B.

² *Wilkinson v. Lloyd*, 7 Q. B. 27.

³ *Poole v. Middleton*, 29 Beav. 646; *Crawford v. Provident Ins. Co.*, 8 U. C. C. P. 263. In a New York case stock was transferred to A. on the day of the commencement of an action to set aside sales made by the corporation, in order that A. might join in the action. The money with which the purchase was made was placed to A.'s credit by the person who wanted him to join, and the shares were not transferred on the books of the corporation, and it was held that the transfer carried title to A., and that he was properly a party to the action. *Ervin v. Oregon Ry. & Nav. Co.*, 35 Hun, 544, *Davis, P. J.*, dissenting.

⁴ *Brisbane v. Delaware, L. & W. R. Co.*, 25 Hun, 438; s. c. 94 N. Y. 202.

⁵ *Blaisdell v. Bohr*, (1881) 68 Ga. 56.

duty.¹ Failure of consideration or informality in the transfer can not be made a ground for setting it aside before registration.²

§ 684. **Negotiability of bonds and coupons.**—Bonds and coupons negotiable in form are negotiable instruments having all the qualities and incidents of commercial paper.³ This

¹ *Arnold v. Cheque Bank*, 1 C. P. Div. 578; *Baxendale v. Bennett*, 3 Q. B. Div. 525; *Coventry v. Great Eastern Ry. Co.*, 11 Q. B. Div. 776; *Swan v. North British &c. Co.*, 2 H. & C. 181.

² *Cushman v. Thayer Manuf. Co.*, 76 N. Y. 365; s. c. 32 Am. Rep. 315; *Hall v. United States Ins. Co.*, 5 Gill, 484.

³ *Zabriskie v. Cleveland &c. R. Co.*, (1859) 23 How. 381; *White v. Vermont &c. R. Co.*, 21 How. 576, where the authorities are extensively reviewed; *Kenosha v. Lamson*, 9 Wall. 477; *Chicago &c. R. Co. v. Howard*, 7 Wall. 392; *Rogers v. Burlington*, 3 Wall. 654; *Murray v. Lardner*, 2 Wall. 110; *Myer v. Muscatine*, 1 Wall. 382; *Van Hostrup v. Madison City*, 1 Wall. 291; *Moran v. Miami County*, 2 Black, 722; *Woods v. Lawrence County*, 1 Black, 386; *Ottawa v. Portsmouth National Bank*, (1881) 105 U. S. 342; *Roberts v. Bolles*, 101 U. S. 119; *Humboldt v. Long*, 92 U. S. 642; *Lexington v. Butler*, 14 Wall. 282; *Mercer County v. Hackett*, 1 Wall. 83; *Gelpcke v. Dubuque*, 1 Wall. 175; *McClelland v. Norfolk Southern R. Co.*, (1888) 110 N. Y. 469, 475; s. c. 4 Ry. & Corp. L. J. 545; *Everston v. National Bank*, 66 N. Y. 14; s. c. 23 Am. Rep. 9, annotated; *Brookman v. Metcalf*, 32 N. Y. 591; *Mechanics' Bank v. New York &c. Ry. Co.*, 13 N. Y. 599; *Connecticut &c. Co. v. Cleveland &c. R. Co.*, 41 Barb. 9; *Brainard v. New York &c. R. Co.*, 25 N. Y.

496; *Blake v. Livingston County*, 61 Barb. 149; *De Voss v. Richmond*, 18 Gratt. 338; *Arents v. Commonwealth*, 18 Gratt. 750; *Langston v. South Carolina R. Co.*, 2 S. C. N. S. 248; *Craig v. Vicksburg*, 31 Miss. 216; *Maddox v. Graham*, 2 Met. (Ky.) 56; *Shooner v. Holmes*, (1869) 102 Mass. 503; s. c. 3 Am. Rep. 491; *Chapin v. Vermont &c. R. Co.*, 8 Gray, 575; *Myers v. York &c. R. Co.*, 43 Me. 239; *Diamond v. Lawrence Co.*, 37 Pa. St. 353; s. c. 78 Am. Dec. 429; *Junction R. Co. v. Cleneay*, 13 Ind. 161; *Johnson v. Stark County*, 24 Ill. 92; *Clark v. Janesville*, 10 Wis. 140; *National Exchange Bank v. Hartford &c. R. Co.*, 8 R. I. 375; s. c. 5 Am. Rep. 582; *Bridgeport v. Housatonic R. Co.*, 15 Conn. 502; *Brickley v. Welch*, 31 Conn. 342; *Morris Canal &c. Co. v. Fisher*, (1853) 9 N. J. Eq. 667; s. c. 64 Am. Dec. 428, annotated; *Beaver Co. v. Armstrong*, (1863) 44 Pa. St. 63; *Commonwealth v. Perkins*, 43 Pa. St. 400; *Carr v. Le Fèvre*, 27 Pa. St. 413; *Bank v. Jones*, 16 Ohio St. 145; *Eaton &c. R. Co. v. Hunt*, 20 Ind. 457; *Eagle v. Kohn*, 84 Ill. 292; *Clerk v. Des Moines*, 19 Iowa, 213; *Griffith v. Burden*, 35 Iowa, 138; "Unregistered Securities & Limited Companies," 67 L. T. 260; 2 *Schouler on Personal Property*, (2nd ed.) 569; *Parsons on Contracts*, 240; *Rorer on Railroads*, 250; *Article on Coupons by C. W. Hassler*, 4 Cent. L. J. 315.

negotiable quality is not derived from the law merchant, but from the fact that these instruments have been invented for the purpose and are actually treated as negotiable.¹ And it is immaterial that the bonds may be under seal, for that is a mere incident of their issue by corporations instead of by natural persons.² Accordingly they pass by delivery under assignment in blank and are not subject as specialties to any equities between the prior holders, nor between them and the obligor corporation.³ And the *bona fide* holder of bonds has a right to presume that they are properly issued, where the corporation has the power under any circumstances to issue negotiable securities. They are no more liable to be impeached in his hands than any other commercial paper.⁴ So also, he may enforce the bond by suit in his own name, as commercial paper rather than a *chose in action*.⁵ But, as in the case of negotiable paper generally, the transferrer only warrants the genuineness of the instrument⁶ and his own title thereto, but not the solvency of the debtor nor the collectibility of the bond.⁷ If, however, the assignee of a bond can not recover it from the obligor by reason of the consideration of it having failed before the assignment was made,

¹ Mercer Co. v. Hackett, (1863) 1 Wall. 95. Cf. McCoy v. Washington County, 3 Wall. Jr. 381; Clarke v. Janesville, 1 Biss. 98; Morris Canal &c. Co. v. Fisher, (1853) 9 N. J. Eq. 667; s. c. 64 Am. Dec. 423. and note p. 430.

² Mercer Co. v. Hackett, (1863) 1 Wall. 95; Dinsmore v. Duncan, 57 N. Y. 573; s. c. 15 Am. Rep. 534; Clark v. Iowa City, 20 Wall. 553; Gelpcke v. Dubuque, 1 Wall. 175; Morris Canal &c. Co. v. Fisher, (1853) 9 N. J. Eq. 667; s. c. 64 Am. Dec. 423, annotated; Langston v. South Carolina R. Co., 2 S. C. 248; Craig v. Vicksburgh, 31 Miss. 216; Virginia v. Chesapeake &c. Canal Co., 32 Md. 501; Chapin v. Vermont &c. R. Co., 8 Gray, 575; Jackson v. York &c. R. Co., 48 Me. 147; Carr v. La Fevre, 27 Pa. St. 413.

³ Everston v. National Bank, 66

N. Y. 14; s. c. 23 Am. Rep. 9, and note; McClelland v. Norfolk Southern R. Co., (1888) 110 N. Y. 469, 475; Morris Canal &c. Co. v. Fisher, (1853) 9 N. J. Eq. 667; s. c. 64 Am. Dec. 423, and note; Brainerd v. New York &c. R. Co., 25 N. Y. 496; Commissioners v. Aspinwall, 21 How. 539; Thompson v. Lee County, 3 Wall. 327.

⁴ City of Lexington v. Butler, (1871) 14 Wall. 282; Cooper v. Town of Thompson, 12 Blatch. 434, 437.

⁵ Ottawa v. Portsmouth National Bank, (1880) 103 U. S. 342. Cf. Dean v. Hall, 17 Wend. 214; Brush v. Reeves, 3 Johns. 439; 3 Kent's Commentaries, 78.

⁶ Utley v. Donaldson, (1876) 94 U. S. 29, 45; Flynn v. Allen, 57 Pa. St. 482; Strob v. Hess, 1 Watts & S. 153.

⁷ Ketchum v. Duncan, (1878) 96 U. S. 659, 677.

he may recover back from the assignor the money he paid for the assignment, whether he hold his guaranty or not.¹

§ 685. **Essentials of negotiability.**—By the rules governing commercial paper it is essential to the negotiability of bonds and coupons that they should provide for the unconditional payment to a person, or order or bearer, of a certain sum at a time capable of exact ascertainment.² But the negotiability of this kind of paper is not destroyed by merely leaving the name of the payee blank,³ for the holder may fill up the blank with his own name.⁴ And where the bond itself fulfills all the requirements of negotiability, its character is not affected by the fact that the statute under which it is issued provides that the obligor may pay it at pleasure before due.⁵ But if a bond, payable at a certain time, itself contains a condition by which the makers reserve the right "to pay the same at any time to be named by them," it is not negotiable.⁶ And again if the place of payment be left blank, the bonds are non-negotiable.⁷ The general rule, therefore, is that uncertainty in any one of the essential particulars of negotiability reduces the instrument to a mere *chose in action*.⁸

¹ Flynn v. Allen, 57 Pa. St. 482, 485; Kauffelt v. Leber, 9 Watts & S. 93.

² Evertson v. National Bank, 66 N. Y. 14; s. c. 23 Am. Rep. 9; Frank v. Wessels, 64 N. Y. 155; Dinsmore v. Duncan, 57 N. Y. 573, 580; s. c. 15 Am. Rep. 534.

³ Gelpcke v. Dubuque, 1 Wall. 176; Mercer County v. Hackett, 1 Wall. 83; Bronson v. La Crosse &c. R. Co., 2 Wall. 283; White v. Vermont &c. R. Co., (1888) 21 How. Pr. 575; Finnegan v. Lee, 18 How. Pr. 186.

⁴ Chapin v. Vermont &c. R. Co., 8 Gray, 576; White v. Vermont &c. R. Co., (1888) 21 How. 575; Hubbard v. New York &c. R. Co., 14 Abb. Pr. 275.

⁵ Ackley School Dist. v. Hall, (1884) 113 U. S. 135; Indiana School Dist. v. Stone, 106 U. S. 183; Marine &c. Manuf. Co. v. Bradley, 105 U. S. 280.

⁶ Way v. Smith, 111 Mass. 523; Hubbard v. Mosely, 11 Gray, 170; Chouteau v. Allen, (1879) 70 Mo. 290.

So also if coupons be subject to the condition that the time of their payment should be changed, altered and postponed from time to time at the option of a majority of the holders of a series of bonds simultaneously issued therewith, it would deprive them of one of the essential characteristics of negotiable paper. Ruger, C. J., in McClelland v. Norfolk Southern R. Co., (1888) 110 N. Y. 469, 476; s. c. 4 Ry. & Corp. L. J. 545.

⁷ Parsons v. Jackson, (1878) 99 U. S. 434; Jackson v. Vicksburg R. Co., 2 Woods, 141. Cf. Indiana &c. R. Co. v. Sprague, 103 U. S. 762; Jackson v. Ludeling, 99 U. S. 513; Rouede v. Jersey City, 18 Fed. Rep. 722.

⁸ Jackson v. Vicksburg &c. R. Co., 2 Woods, 141; Sedgwick v. McKim,

§ 686. **Limitations on negotiability.**—There has been, especially in England, considerable hesitation in fully accepting the doctrine of the negotiability of bonds and coupons. The statute in that country recognizes no method of transfer except by deed wherein the consideration is truly stated.¹ Accordingly it has been there held that the mere fact that a security is payable to a designated person, “his executors, administrators or transferees, or to the holder for the time being,” does not make it assignable free from equities between the original parties.² And the courts have seemed very reluctant to hold that even a bond payable to bearer and without more, is commercial paper so as to cut off equities.³ So also in Illinois where the *bona fide* assignee of commercial paper secured by mortgage seeks relief in equity by the foreclosure of the mortgage, the mortgagor may successfully interpose any defense which would have been available against the original payee or holder of the paper.⁴ But there has been little difficulty in inducing the courts to accord practical negotiability. Thus, where debentures under the seal of a joint-stock company are deemed to be negotiable, they are held to possess the most important characteristic thereof, that of being in the hands of a *bona fide* holder, free from equities between

53 N. Y. 307; *Athenæum &c. Assurance Soc. v. Pooley*, 3 De Gex & J. 294; *Watson v. Mid-Wales Ry. Co.*, L. R. 2 C. P. 593. For when bonds or coupons “contain especial stipulations and their payment is subject to contingencies not within the control of their holders, they are, by established rules, deprived of the character of negotiable instruments, and become exposed to any defense existing thereto, as between the original parties to the instrument. *Ruger, C. J.*, in *McClelland v. Norfolk Southern R. Co.*, (1888) 110 N. Y. 469, 475; *s. c.* 4 Ry. & Corp. L. J. 545.

18 Vic. ch. 16, §§ 46, 49.

² *In re Natal &c. Co.*, 3 Ch. App. 355.

³ *In re General Estates Co.*, 3 Ch. 758; *In re Imperial Land Co.*, 11 Eq. 478; *In re Blakely &c. Co.*, 3

Ch. 154; *Goodwin v. Robarts*, 1 App. Cas. 476. So also to exclude equities it has been said that it must be made to appear very clearly that the parties so intended. *In re Natal Investment Co.*, L. R. 3 Ch. App. 355. *Cf.* *Aberman Iron Works v. Mekens*, L. R. 5 Eq. Cas. 485, 517. And again, the equitable transferee's rights are limited to sums actually advanced or paid. *In re Romford Canal Co.*, (1883) 24 Ch. Div. 85. And if the instrument is not negotiable at law, an assignee for value without notice derives no higher title than his assignor, whether the instrument is expressed to be payable to bearer or not. *Crouch v. Credit Foncier*, L. R. 8 Q. B. 374.

⁴ *Chicago &c. R. Co. v. Loewenthal*, (1879) 93 Ill. 433, 450.

the company and the primary holder.¹ And it has been repeatedly held that the company may lose its right to set up equities against a holder of its bonds by a separate contract and by its conduct, and that it may even be estopped by the representation in the instrument itself that it is payable to bearer.² So also in a modern case the facts that the instruments were negotiable in form, that they were so customarily regarded, and especially that in the particular case they had been so treated, were each regarded as conclusive.³ Probably there has never been any doubt that where bonds assignable at law are transferred in accordance with the statutory provision, the transferee is the proper person to sue thereon.⁴

§ 687. References between bonds, coupons and mortgages.—The reference in coupons to the bonds and mortgage and in bonds to the terms and conditions of the mortgage clearly charge the holders of both coupons and bonds with notice of the provisions contained in each of those instruments.⁵ And again where a bond merely refers to the mortgage by which it is secured, the recitals in the mortgage will control with respect to the bond.⁶ But where the bond itself sets forth the terms of the contract and there is a variance between it and the mortgage deed, the bond will control.⁷

¹ *In re* Blakely Ordnance Co., (1867) L. R. 3 Ch. App. 154, citing *In re* Agra &c. Bank, L. R. 2 Ch. App. 391.

² *In re* Blakely &c. Co., 3 Ch. 154; *Deckson v. Swansea Vale Ry. Co.*, L. R. 4 Q. B. 44; *Graham v. Johnson*, 8 Eq. 37; *In re* South Essex Co., 11 Eq. 157; *Higgs v. Assam &c. Co.*, L. R. 4 Ex. 387; *In re* Northern Assam &c. Co., 10 Eq. 459; *In re* Hercules Ins. Co., 19 Eq. 302; *Easton v. London &c. Bank*, (1886) 34 Ch. Div. 95; *Goodwin v. Robarts*, 1 App. Cas. 476.

³ *Easton v. London Joint-Stock Bank*, (1886) 34 Ch. Div. 95. In this case Brownfield, L. J., said: "I am

not myself so much afraid, so jealous, as the law was in past times of recognizing these instruments as negotiable, simply because they are not in the classified category of negotiable instruments."

⁴ *Vertue v. East Anglian Ry. Co.*, (1850) 5 Ex. 280.

⁵ *McClelland v. Norfolk &c. R. Co.*, (1888) 110 N. Y. 469; s. c. 6 Am. St. Rep. 397; *McClure v. Township of Oxford*, (1876) 94 U. S. 429.

⁶ *Caylus v. New York &c. R. Co.*, 10 Hun., 295.

⁷ *Indiana &c. R. Co. v. Sprague*, 103 U. S. 756. Cf. *Morgan v. United States*, 113 U. S. 502; *Rouede v. Jersey City*, 18 Fed. Rep. 729.

§ 688. **Alteration of the numbers of bonds.**—An alteration of the serial numbers of a corporate bond, although done by a thief and for a felonious purpose, is not such a material alteration of the bond as to invalidate it in the hands of an innocent purchaser.¹ Especially is this the case where, as is usual, there is nothing in the appearance of the altered bonds, or the numbers, when purchased, which would excite the suspicion of a prudent and careful man, the alterations having been so skilfully effected as that they can only be discovered by the aid of a magnifying glass.² For the number of a bond is put upon it for the convenience of the maker in identifying it, and in no wise affects the substance of the paper, and may be disregarded by the purchaser as immaterial.³ Accordingly, the original owner of a stolen bond can not recover the money due on it where the obligor had paid it, although its altered number was the same as that of a bond previously paid.⁴ And it makes no difference that the bonds were, by statute, redeemable at the pleasure of the issuer, upon call, after a certain date, and had been duly called when bought by the purchasers.⁵ But it has been said *obiter* that the alteration of the numbers in negotiable bonds was an alteration in material particulars. The question, however, in the case was whether the purchaser received the bonds under such suspicious circumstances as to deprive him of the protection of a *bona fide* purchaser, and the decision turned upon a question of fact.⁶

¹ *Wylie v. Missouri Pacific R. Co.*, (1890) 41 Fed. Rep. 623; s. c. 7 Ry. & Corp. L. J. 250; *Morgan v. United States*, (1884) 113 U. S. 476.

² *Morgan v. United States*, (1884) 113 U. S. 476.

³ *Commonwealth v. Emigrant &c. Bank*, 98 Mass. 12; *City of Elizabeth v. Force*, 29 N. J. Eq. 587.

⁴ *City of Elizabeth v. Force*, 29 N. J. Eq. 587.

⁵ *Morgan v. United States*, (1884) 113 U. S. 476.

⁶ *Birdsall v. Russel*, 29 N. Y. 220. In England, it was held, by the Court of Appeals, that the alteration

of a Bank of England note by erasing the number and substituting another was a material alteration, and that a *bona fide* holder for value could not recover against the bank upon the altered note. The decision proceeded mainly, however, upon the consideration that the number upon such a note is an essential part of the note, because it has always been recognized to be so by the public, so that no one would take it if the number were not upon it. *Suffell v. Bank of England*, (1882) 9 Q. B. Div. 555. The observations of the Master of the Rolls

§ 689. **Maturity of bonds.**—Bonds, like other commercial paper, cease to be negotiable after maturity, and the purchaser is put upon inquiry concerning the equities of antecedent holders.¹ For after maturity a purchaser for value is not a *bona fide* purchaser to the extent of his being protected in his purchase except so far as he succeeds to the rights of one who purchased in good faith before maturity.² For the fact of non-payment discredits the instrument and deprives it of any immunity which before maturity was secured to it in favor of *bona fide* purchasers for value without actual notice of any defect either in the obligation or in the title.³ But overdue and unpaid coupons attached to a bond with time yet to run do not render it nor the other coupons dishonored paper, so as to subject them in the hands of a purchaser for value to defenses good against the original holder.⁴ Bondholders can not be compelled by the legislature nor by the court to accept

are in point. He says:—“In an ordinary case it may be said that changing the number put on a bill of exchange or on a check will not affect the contract, and may not be a material alteration; but take the case of debentures issued by a company, or a bond issued by a turnpike trust or a foreign government, and that the bond is to be paid according to the number drawn by lot, which is a very common mode of payment; there although the number would not affect the contract on the face of the instrument, it really would affect the contract in another way, and I should think there would be no doubt in the world that in such a case an alteration of the number would be a material alteration in the instrument.”

¹ Northampton Nat. Bank v. Kidder, (1887) 106 N. Y. 221, 225; s. c. 60 Am. Rep. 443; Morgan v. United States, 103 U. S. 476, 499; Vermilye v. Adams Express Co., (1874) 21 Wall. 138, 145; Hinkley v. Merchants' Nat. Bank, 131 Mass. 147;

Evertson v. National Bank, 66 N. Y. 14; s. c. 4 Hun, 692; s. c. 23 Am. Rep. 9; Arents v. Commonwealth, 18 Grat. 750; First National Bank v. County Commissioners, 14 Minn. 77, 79; s. c. 100 Am. Dec. 194; Hotchkiss v. National Banks, 21 Wall. 354; National Bank v. Texas, 20 Wall. 72; Murray v. Lardner, 2 Wall. 110; Gelbough v. Norfolk & Co. R. Co., 1 Hughes, 410.

² Cromwell v. Sac County, 96 U. S. 51; Grand Rapids R. Co. v. Sanders, 54 How. Pr. 214; Thompson v. Perine, (1882) 106 U. S. 589; Commissioners v. Bolles, 94 U. S. 109; Commissioners v. Clark, 94 U. S. 279; McClure v. Township of Oxford, 94 U. S. 432; Arents v. Commonwealth, 18 Grat. 750.

³ Northampton National Bank v. Kidder, (1887) 106 N. Y. 221, 225, *per* Peckham, J.

⁴ Cromwell v. Sac County, (1877) 96 U. S. 51; National Bank v. Kirby, 108 Mass. 497. But see First National Bank v. County Commissioners, 14 Minn. 77; s. c. 100 Am. Dec. 194.

payment before maturity, nor to relinquish their lien.¹ And a contract indorsed upon bonds, providing for a sinking fund to meet them at maturity, does not give the obligor the right to redeem them when the fund becomes sufficient for that purpose.² Where bonds payable upon the expiration of a term of years contain a clause providing that they "will be redeemed, if desired," at a certain earlier date, it is with the holder, and not with the payer, to choose between the two times of payment.³ Bonds bear interest after their maturity at the same rate they bore before maturity.⁴

§ 690. Coupons as negotiable instruments.—Coupons when severed from the bonds to which they were originally attached are in legal effect equivalent to separate bonds for the different instalments of interest.⁵ They are negotiable promises for the payment of money, and are therefore not to be considered as "goods" but as the representatives of money and subject to the same rules as bank bills and other negotiable instruments payable in money.⁶ Accordingly, an action will lie by one bondholder against a corporation for interest due on a bond, although the principal is not yet due, and notwithstanding the fact that the mortgage securing the bond provides that upon default in payment of interest the trustees to whom the mortgage was executed shall, at the request of the holders of a certain amount of bonds, proceed by *sci. fa.* to collect interest and principal for the benefit of all bondholders equally.⁷ Detached coupons circulate as independent securities,⁸ unless they contain references to the bonds from

¹ Beach on Railways, § 648, citing Randolph v. Middleton, 26 N. J. Eq. 543.

² Chicago &c. R. Co. v. Pyne, 30 Fed. Rep. 86.

³ Beach on Railways, § 648, citing Allentown School District v. Derr, (1887) 115 Pa. St. 439.

⁴ Cromwell v. Sac County, (1877) 96 U. S. 51, 61, where many cases are cited and a conflict of authority noted. Cf. Cook v. Fowler, L. R. 7 H. of L. 27; Price v. Great Western Ry. Co., 16 Mees. & W. 244.

⁵ Clark v. Iowa City, (1873) 20 Wall. 589.

⁶ Clark v. Iowa City, (1873) 20 Wall. 589; Connecticut v. Emigrant &c. Bank, 98 Mass. 12; Spooner v. Holmes, 102 Mass. 507; Wookey v. Pole, 4 B. & A. 1; Georgia v. Meeville, 4 D. & R. 641; s. c. 3 B. & C. 45.

⁷ Montgomery County Agricultural Soc. v. Francis, (1882) 103 Pa. St. 378.

⁸ Nashville v. Potomac Ins. Co., (1872) 21 Baxt. 296; Nashville v. First National Bank, 1 Baxt. 402.

which they were severed, which may destroy their independent negotiable nature.¹ So also where detached coupons refer upon their face to the bonds and purport to be for the semi-annual interest accruing thereon, this puts the purchaser upon inquiry for the bonds and charges him with notice of all they contain.² Where, however, there are no references to the bonds, the coupons once detached and negotiated cease to be a mere incident of the bond and become independent claims, and their amount, with interest after demand of payment, is recoverable under a general count in debt,³ even though the bonds for some reason may have been cancelled or paid before maturity.⁴ And it has been said that detached coupons, even when overdue, are not to be counted as overdue paper until the maturity of the bonds from which they were cut.⁵

§ 691. Formal requisites of the negotiability of coupons.

To be negotiable, a coupon must be so upon its face without reference to any other paper; if it is not payable to order or

¹ McClelland v. Norfolk Southern R. Co., (1888) 110 N. Y. 489. On the other hand recitals in the bonds are conclusive evidence in favor of a purchaser of the coupons who has no notice that the conditions precedent to the issue have not been fulfilled. Marshall v. Elgin, 3 McCrary, 35; s. c. 8 Fed. Rep. 788. Cf. Lexington v. Butler, 14 Wall. 282; Kenosha v. Lawson, 9 Wall. 483; State v. Spartanburgh &c. R. Co., 8 S. C. 129, 163.

² McClure v. Township of Oxford, (1876) 94 U. S. 429.

³ National Bank v. Hartford &c. R. Co., (1866) 8 R. I. 375; Ide v. Connecticut River R. Co., 32 Vt. 297, 299; Conors v. Aspinwall, 21 How. 536, 546; Beaver Co. v. Armstrong, 44 Pa. St. 63; Meyer v. City of Muscatine, 1 Wall. 384; Seybert v. City of Pittsburgh, 1 Wall. 272; Van Hoster v. Madison City, 1 Wall. 294; Sheboygan Co. v. Parker, 3 Wall. 93; Thomson v. Lee Co., 3 Wall. 327; White v. Vermont & Massachusetts

R. Co., 21 How. 575, 577; Lexington v. Butler, 14 Wall. 282; Koshkonong v. Burton, (1881) 104 U. S. 668, affirming s. c. 4 Fed. Rep. 373; Amy v. Dubuque, 98 U. S. 470; Knox County v. Aspinwall, 21 How. 539; Clark v. Iowa City, (1873) 20 Wall. 583; City v. Lamson, 9 Wall. 477; First National Bank v. Bennington, 16 Blatchf. 53; Junction R. Co. v. Cleaneay, 13 Ind. 161. But see Crosby v. New London &c. R. Co., 26 Conn. 121; Shoemaker v. Goshen, 14 Ohio St. 569; White v. Vermont &c. R. Co., (1858) 21 How. 575; McElrath v. Pittsburg R. Co., 55 Pa. St. 189; Beaver County v. Armstrong, 44 Pa. St. 63; Chapin v. Vermont &c. R. Co., 8 Gray, 575.

⁴ Walnut v. Wade, 103 U. S. 683; Clark v. Iowa City, (1873) 20 Wall. 583; Stewart v. Lansing, 104 U. S. 505.

⁵ Thompson v. Perrine, (1882) 106 U. S. 589; Cromwell v. Sac County, (1877) 96 U. S. 51.

bearer and does not contain other equivalent words, it is not negotiable.¹ There are, however, cases declaring the more liberal rule that words of promise connected with a definite promisor,² or evidently expressing the intention of the obligor that they shall be negotiable, are all that is necessary to make them negotiable paper, however informally they may be worded.³ And in a suit upon coupons profert of the bond is not necessary, as the coupons circulate as independent securities.⁴ When upon their face coupons refer to the bonds to which they are attached and purport to be for the interest accruing thereon, the purchaser of them is charged with notice of all that the bonds contain.⁵

§ 692. Coupons likened to checks, drafts, bills and notes.

Coupons, when made payable to bearer, are transferable by delivery and are subject to the same rules and regulations, so far as respects the right and title of the holder, as negotiable bills of exchange and promissory notes.⁶ They have been

¹ *Augusta Bank v. Augusta*, (1860) 49 Me. 507, holding that evidence of commercial custom to the contrary was properly excluded; *Evertson v. National Bank*, (1876) 66 N. Y. 14, 19, 20; s. c. 23 Am. Rep. 9, reversing s. c. 4 Hun, 692; *Crosby v. New London &c. R. Co.*, 26 Conn. 121; *Jackson v. York &c. R. Co.*, (1858) 48 Me. 147; *Meyers v. York &c. R. Co.*, 43 Me. 232; *Cranch v. Credit Foncier*, L. R. 8 Q. B. 374. The merest reference to the bond in a coupon, such as the statement that it is for interest upon the company's first mortgage bonds, is sufficient to destroy its independent negotiable character. *McClelland v. Norfolk &c. R. Co.*, (1888) 110 N. Y. 469; s. c. 6 Am. St. Rep. 397.

² *McCoy v. Washington County*, 3 Wall. Jr. 381; *Smith v. Clark County*, 54 Mo. 58; *Johnson v. Stark County*, 24 Ill. 75; *Haven v. Grand Junction R. Co.*, 109 Mass. 88.

³ *McCoy v. Washington County*, 3

Wall. Jr. 381; *Woods v. Lawrence*, (1861) 1 Black, 360; *Smith v. Clark County*, 54 Mo. 58; *Note to Morris Canal &c. Co. v. Fisher*, 64 Am. Dec. 428, 433.

⁴ *Nashville v. Potomac Ins. Co.*, (1872) 2 Baxt. 296; *Nashville v. First National Bank*, 1 Baxt. 402.

⁵ *McClure v. Township of Oxford*, (1876) 94 U. S. 429; *Harshman v. Bates Co.*, 92 U. S. 509. But see *Evertson v. National Bank*, (1876) 66 N. Y. 14; s. c. 23 Am. Rep. 9, where a recital that it was for interest upon a bond of a certain denomination was held not to require the production of the bond in an action upon the coupon.

⁶ *Lexington v. Butler*, 14 Wall. 282; *Ketchum v. Duncan*, 96 U. S. 659; *Cromwell v. Sac County*, 96 U. S. 58; *Mercer Co. v. Hackett*, 1 Wall. 95; *Murray v. Lardner*, 2 Wall. 110; *Stewart v. Lansing*, (1881) 104 U. S. 505; *Ohio v. Frank*, 103 U. S. 697; *Walnut v. Wade*, 103 U. S. 683;

said to be checks rather than bills.¹ When payable at a particular office, they import that the debtor will have a deposit at the time and place specified to answer what is substantially a draft upon the fund.² Again they are in the nature of promissory notes,³ but have been held not to be promissory notes in origin nor in common speech, so as to be within an act giving bills and notes days of grace.⁴ It is said that it is of very little consequence, however, whether they are promissory notes, bills, drafts or checks, for they have the same quality of negotiability as either of those instruments.⁵

§ 693. Coupons as instruments *sui generis*.—Coupons differ in some respects from any other kind of negotiable paper except in respect of their negotiability. For example they differ from bills of exchange in not being intended for acceptance when drawn on a bank.⁶ They differ from promissory notes in respect to presentation and demand, interest and limitations. They also differ from other independent paper in that the release of the bond releases the coupons;⁷ that when coupons are severed and transferred, they carry by implication an interest in the mortgage debt.⁸ Coupons have no priority over the bond itself when both are due, but share in the fund *pro rata*.⁹ Another distinction is that when coupons are converted the measure of damages in a suit by the maker is their market value, and not as in the case of an individual note the sum he

Aurora v. West, 7 Wall. 82; *Thomson v. Lee County*, 3 Wall. 327; *Philadelphia &c. R. Co. v. Smith*, 105 Pa. St. 195; *Philadelphia &c. R. Co. v. Fidelity &c. Co.*, 105 Pa. St. 216; *Bennington &c. Bank v. Mount Tabor*, 52 Vt. 87; "Negotiability of Detached Coupons," 8 So. L. Rev. N. S. 358.

¹ *In re Brown*, 2 Story, 502; *Arents v. Commonwealth*, 18 Gratt. 773.

² *Philadelphia &c. R. Co. v. Adams*, 54 Pa. St. 94.

³ *Hinkley v. Railroad Co.*, 129 Mass. 52; and are promissory notes within the meaning of the United States statutes concerning national banks; although it is doubtful

whether bonds could be so regarded. *First National Bank v. Bennington*, 16 Blatch. 53, 56; *Thompson v. Lee County*, 3 Wall. 327.

⁴ *Chaffee v. Middlesex R. Co.*, (1888) 146 Mass. 224, 235.

⁵ *Beaver Co. v. Armstrong*, 44 Pa. St. 63, 69.

⁶ *Jones on Railroad Securities*, § 317; *Daniel on Negotiable Instruments*, § 1490.

⁷ *State v. North Louisiana R. Co.*, 25 La. Ann. 65.

⁸ *In re Sewall v. Brainerd*, 35 Vt. 364, 374.

⁹ *Welsh v. St. Paul &c. R. Co.*, 25 Minn. 314.

is ultimately compelled to pay.¹ Again, if coupons are pledged they can be sold on default of the pledgor,² whereas if notes of private parties are pledged, the pledgee takes only the power of collection, not that of selling it.³ Another distinction, in respect of days of grace, has some authority in its support. Thus, in Massachusetts it has been said that the reasons for allowing days of grace on foreign bills of exchange, payable at sight, or at a future day certain, have little application to bonds with coupons, issued by a corporation to obtain money, which usually have a long time to run, and are commonly bought and held as an investment.⁴ The same court said that the device of separate detachable interest warrants payable to bearer has been adopted for convenience, and courts have invested them, when detached, with many of the qualities of negotiable promissory notes, to carry into effect the intention of the parties apparent on the face of the contract, but they purport to be only promises to pay certain sums of money as interest on the principal obligation.⁵ But in a leading New York case, holding that coupons are entitled to grace, the court argued that, coming within the ordinary definition of bills of exchange or promissory notes, coupons necessarily have all the characteristics of those instruments, and are entitled to the benefit of the grace allowed upon them.⁶

§ 694. **Receivers' certificates.**—Receivers' certificates, frequently issued by receivers of railway corporations to meet the current expenses of maintaining the railway as a going

¹ *Tracy v. Talmadge*, 14 N. Y. 162.

² *City of Memphis v. Brown*, 17 Am. L. T. R. 434; *Brown v. Ward*, 3 Duer, 660.

³ *Morris Canal Co. v. Fisher*, 1 Stockt. 667; *Morris Canal Co. v. Lewis*, 1 Beasley, 323; *Wheeler v. Newboh*, 5 Duer, 29; s. c. 16 N. Y. 392; *Brown v. Ward*, 3 Duer, 660, *Garlic v. Jones*, 12 Johns. 146.

⁴ *Chaffee v. Middlesex R. Co.*, (1888) 146 Mass. 224, 235. See also *Arents*

v. Commonwealth, 18 Grat. 750; 2 Daniel on Negotiable Instruments, §§ 1490a, 1505; and note to 64 Am. Dec. 428, 434.

⁵ *Chaffee v. Middlesex R. Co.*, (1888) 146 Mass. 224, 235. Cf. *Bank v. Leach*, 52 N. Y. 350; *Macloon v. Smith*, 49 Wis. 200; *Jackson v. Railroad Co.*, 48 Me. 147; *Rose v. Bridgeport*, 17 Conn. 243; *Beaver v. Armstrong*, 44 Pa. St. 63.

⁶ *Evertson v. National Bank of Newport*, (1876) 66 N. Y. 14, 22.

concern, and constituting a lien upon the income of the road superior even to mortgage bonds and coupons, may be appropriately mentioned in this connection. They are not, strictly speaking, corporate obligations, although the property of the company in the receiver's hands is pledged to their payment.¹ While they are to that extent somewhat of the nature of corporate bonds, they differ from commercial paper in that they are acknowledgments of indebtedness rather than promises to pay. The fund upon which they are drawn is usually uncertain, and there is no one personally liable for their payment. The fund in the receiver's hands is alone bound for their redemption, and their payment can be compelled only by an application to the court by whose authority they were issued.² It is, therefore, the ordinary rule that they are not negotiable instruments.³ And the assignor, or indorser, is not liable as a guarantor or indorser of commercial paper; nor does the assignment of them import a warranty that they are collectible or that they will be paid.⁴ It has been said that if they

¹ *Meyer v. Johnson*, 53 Ala. 349; *Turner v. Peoria & Springfield R. Co.*, 95 Ill. 134; s. c. 35 Am. Rep. 144, holding that if the fund be insufficient, it is to be divided proportionally among the holders.

² *Beach on Receivers*, § 401; *Wallace v. Loomis*, 97 U. S. 146, 162; *Miltenberger v. Logansport R. Co.*, 106 U. S. 286, 309; *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434, 454; *Turner v. Peoria & C. R. Co.*, 95 Ill. 134; s. c. 35 Am. Rep. 144.

³ *Beach on Railroads*, § 758; *Husband v. Eppling*, 81 Ill. 172; s. c. 25 Am. Rep. 273; *Baird v. Underwood*, 74 Ill. 176; *Turner v. Peoria & C. R. Co.*, 95 Ill. 134; s. c. 35 Am. Rep. 144; *Bank of Montreal v. Chicago & C. R. Co.*, 48 Iowa. 518; *Union Trust Co. v. Chicago & C. R. Co.*, 7 Fed. Rep. 513; *McCurdy v. Bowes*, 88 Ind. 583; *Stanton v. Alabama & C. R. Co.*, 2 Woods. 506; *Newbold v. Peoria & C. R. Co.*, 5 Bradw. 367;

Central National Bank of Boston v. Hazard, 1 Ry. & Corp. L. J. 347. *Cf. West v. Foreman*, 21 Ala. 400; *Corbett v. State*, 24 Ga. 287; *Harri-man v. Sanborn*, 43 Me. 128; *Railroad Co. v. Howard*, 7 Wall. 392, 415; *Mechanics' Bank v. New York & C. R. Co.*, 13 N. Y. 599; *Voshell v. Hynson*, 26 Md. 83; *Union Trust Co. v. Soutter*, 107 U. S. 591; *Fosdick v. Schall*, 99 U. S. 235; *Fosdick v. Car Co.*, 99 U. S. 256; *Bright v. North*, 2 Phila. 216; *Beach on Receivers*, § 398. On their face they refer to the particular power thus conferred, and to the particular case then pending in the court. This is sufficient notice to put a prudent dealer on inquiry. Master's Report referred to in *Stanton v. Alabama & C. R. Co.*, 2 Woods. 506, 512, citing *In re Magdalena Steam Navigation Co.* Johns. Eng. Ch. 690.

⁴ *McCurdy v. Rowes*, 88 Ind. 583; *Beach on Receivers*, § 396.

have been issued below par the holder can recover no more than was paid for them,¹ whether he be the original payee or a transferee.² On the other hand, however, there is authority for believing that where the court has authorized their issue below par and the discount has not been unreasonable, the holder may recover their full face value with interest.³

¹ *Swan v. Clark*, 110 U. S. 602. *Cf.* ³ *Union Trust Co. v. Illinois Mid-land Ry. Co.*, 117 U. S. 434, cited in *Union Trust Co. v. Chicago & Lake Huron R. Co.*, 7 Fed. Rep. 513. *Beach on Railways*, 758, where the

² *Stanton v. Alabama &c. R. Co.*, subject is more fully discussed.
² *Woods*, 506.

CHAPTER XXXV.

UNSECURED CREDITORS.

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| <p>§ 695. Introductory.</p> <p>696. Of the forum.</p> <p>697. Time of bringing suit and time of contracting debt.</p> <p>698. Parties plaintiff.</p> <p>699. The same subject continued.</p> <p>700. Parties defendant.</p> <p>701. The same subject continued.</p> <p>702. The corporation as a party defendant.</p> <p>703. Statutory liability — (a) Parties plaintiff.</p> <p>704. (b) Parties defendant.</p> <p>705. Effect of transfer of shares — (a) The transferrer's liability thereafter.</p> <p>706. (b) The transferrer's statutory liability.</p> <p>707. (c) The transferee's common-law liability.</p> <p>708. (d) The transferee's statutory liability.</p> <p>709. (e) Purchasers at sales of forfeited stock.</p> | <p>§ 710. Proceedings against members of voluntary associations.</p> <p>711. Remedies at law and in equity.</p> <p>712. Bills in equity.</p> <p>713. <i>Mandamus</i> to compel calls.</p> <p>714. Calls by courts of equity.</p> <p>715. Whether unsecured creditors may procure appointment of a receiver.</p> <p>716. Powers of receivers and assignees.</p> <p>717. The same subject continued.</p> <p>718. Remedy when a receiver has been appointed in prior proceedings.</p> <p>719. The decree in suits in equity.</p> <p>720. Garnishment.</p> <p>721. Whether the remedy in equity is exclusive.</p> <p>722. Actions at law.</p> <p>723. Interest and costs.</p> <p>724. Evidence — Bill of discovery.</p> |
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§ 695. **Introductory.**—Unsecured creditors of a corporation, having failed to collect their debts from the corporation, have their remedy against its stockholders either by compelling the payment of the amount of the unpaid subscriptions to the capital stock, thus creating a fund for the satisfaction of all the corporate debts ratably, or by enforcing the liability imposed by the charter or other statutory provisions affecting the corporation.¹ A creditor, however, can not maintain

¹ *Halderman v. Ainslie*, 82 Ky. 395; "Bankruptcy & Winding Up," 67 L. T. 111; "Liability of Shareholders & Officers of Manufacturing Companies," 22 L. Rep. 736; "How to become a Contributory," 8 L. J. 73; "Liquidators and Shareholders in Court," 22 Jour. Jur. 641; "Assignments by Corporation," by James L. High, 3 So. L. Rev. (N. S.) 553.

an action at law for the payment of subscriptions, because subscription to the capital stock is a contract between the corporation and the subscriber, and an amount due on the subscription is a debt due to the corporation and not to its creditors, between whom and the stockholders no privity exists as to the contract.¹ But equity, at the instance of creditors of an insolvent commercial corporation, will compel a subscriber to the stock to make payments according to his contract with the corporation.² And this liability for unpaid subscriptions is several and not joint, there being no rule at common law imposing upon stockholders an individual liability for corporate debts.³ Direct personal liability to the corporate creditors can attach to stockholders only by constitutional or statutory provision.⁴ This obligation is not in the nature of a penalty, but is assumed to exist in the implied contract entered into by the individual in becoming a stockholder.⁵

§ 696. Of the forum.—In cases where it is deemed necessary to obtain a judgment against the corporation before creditors can sue on the liability of stockholders upon their unpaid subscriptions, the judgment must be had in the State of the company's domicile.⁶ When the statutory liability of stock-

¹ *Patterson v. Lynde*, 106 U. S. 519; *Brown v. Fish*, 23 Fed. Rep. 228; *Spear v. Grant*, 16 Mass. 9. Cf. "Insolvency of Railway Companies," 9 Sol. J. & Rep. 301, and 11 Sol. J. & Rep. 44 and 374; "Law of Joint-stock Companies in Relation to Bankruptcy," 21 Leg. Obs. 3, 129, 450, and 22 Leg. Obs. 40, a series of articles; "Liability of Shareholders and Directors of Joint-stock Companies," 6 L. T. 138 and 552.

² *Harmon v. Page*, 62 Cal. 448. Cf. "Creditors and Shareholders," 11 Sol. J. & Rep. 170.

³ *Seymour v. Sturgess*, 26 N. Y. 134; *Freeland v. McCullough*, 1 Denio, 414; *Gray v. Coffin*, 9 Cush. 192; *Thompson's Liability of Stockholders*, § 4; *Angell & Ames on Corp.* §§ 591, 595.

⁴ *Reid v. Eatonton Manuf. Co.*, 40 Ga. 98; *Vincent v. Chapman*, 10 Gill & J. 279; *Lowry v. Inman*, 46 N. Y. 119.

⁵ *Flash v. Conn*, 109 U. S. 371; *Carrol v. Green*, 92 U. S. 509; *Blake-man v. Benton*, 9 Mo. App. 107.

⁶ *Barclay v. Tallman*, 4 Edw. Chan. 128; *Murray v. Vanderbilt*, 39 Barb. 147; *Bank of Virginia v. Adams*, 1 Pars. Eq. 534; *Patterson v. Lynde*, (1884) 112 Ill. 196; *Harris v. Pullman*, 84 Ill. 25. Cf. *Claffin v. McDermott*, (1882) 12 Fed. Rep. 375; *McLune v. Bengeni*, 2 Ired. Eq. 513; *Farned v. Harris*, 19 Miss. 366; *Bullitt v. Taylor*, 34 Miss. 708; *Verplanck v. Insurance Co.*, 6 Paige, 503; *Boswell's Lessees v. Otis*, (1850) 9 How. 348. *Contra*, *Bird v. Calvert*, 22 S. C. 292.

holders is an obligation in the nature of a contract, the remedy thereon may be pursued in a State other than that in which the corporation is created.¹ But when it is in the nature of a penalty it can not be enforced in a foreign State.²

§ 697. Time of bringing suit and time of contracting debt.—There are three classes of cases, depending upon different statutory provisions, regulating the liability of stockholders where there has been a transfer of stock. It may be stated generally, with respect to the common law liability of a stockholder upon his unpaid subscription, as distinguished from statutory liability, that a stockholder who transfers his stock or surrenders it to the corporation before making payment thereon, is not liable to a creditor of the corporation whose demand comes into existence subsequently to the surrender.³ As to statutory liability, if the charter or act under which the corporation is formed provides simply that the stockholders shall be personally liable for the debts of the corporation, they are held to be liable only for those contracted at the time they were stockholders.⁴ In other cases construing statutes imposing liability on the stockholders for “all the debts” of the corporation, the rule is that the liability attaches only to those who are stockholders at the time of the commencement of the action, and that those who have transferred their stock before that time, even though they held it at the time the indebtedness was contracted, are released.⁵ Where, however, statutory liability is imposed upon all stockholders, the provision includes both those who were stockholders at the time the debt was incurred and those who are such at the commencement of the action for the collection of the debt.⁶ So in an action to enforce the liability under a charter provision that the stockholders of a bank shall be liable to the amount of their stock, it is sufficient if it appear

¹ *Flash v. Conn*, 109 U. S. 371; *Judson v. Rossie-Galena Co.*, 9 Paige. Aultman's Appeal, 98 Pa. St. 505. 598.

² *Vide supra*, § 150.

³ *Johnson v. Lullman*, 15 Mo. App. 55; *Billings v. Robinson*, 94 N. Y. 415. ⁵ *Child v. Coffin*, 17 Mass. 64; *Cleveland v. Burnham*, 55 Wis. 598; *Deming v. Bull*, 10 Conn. 409.

⁶ *Brown v. Hitchcock*, 36 Ohio St.

⁴ *Phillips v. Therasson*, 11 Hun, 667; *Curtis v. Harlow*, 12 Met. 3. 141; *Tracy v. Yates*, 18 Barb. 152;

that the defendant was a stockholder when the suit was brought, and it is not necessary that it appear that he was a stockholder also when the cause of action accrued.¹ And stockholders can not be released on the simple finding that they did not own stock when the indebtedness was incurred, without its being found that the stock had not been sold by the corporation prior to that time.² Even under such a statutory provision as this, however, one is not held liable for debts contracted before he became a member, where he has also disposed of his stock before action was commenced.³ So a stockholder may escape personal liability on the plea that after he ceased to be a member of the corporation the note sued on was extinguished by the giving of a new one, and that possession of the old note was obtained by fraud.⁴ In New York under the General Manufacturing Act of 1848,⁵ relating to the liability of shareholders for the debts of manufacturing corporations, it is provided that they shall be liable until the whole amount of stock shall be paid in; and it further provides that the stock shall be paid in within two years; but it is held, that a creditor having an unsatisfied execution against the corporation is not obliged to wait until the expiration of the two years before proceeding against a shareholder.⁶ The liability of a stockholder on unpaid stock of an insolvent company remains unchanged, although the judgments against the corporation, sought to be enforced against him, were rendered after he became a stockholder.⁷ A stockholder in a manufacturing corporation, the capital stock of which has not been paid in, can not escape liability for payments falling due after he became a stockholder, under a contract made before.⁸

§ 698. Parties plaintiff.—A debt due from the corporation is not a debt due from the stockholders. The contract of subscription is made with the corporation, and it, or its suc-

¹ *Root v. Sinnock*, (1887) 120 Ill. 350.

⁵ N. Y. Laws of 1848, ch. 40, § 10.

² *Bovewitz v. Van West County Bank*, 41 Ohio St. 78.

⁶ *King v. Duncan*, 38 Hun, 461.

³ *Holyoke Bank v. Burnham*, 11 Cush. 183; *Sayles v. Bates*, 15 R. I. 342.

Cf. N. Y. Laws of 1890, ch. 564, §§ 57, 58.

⁷ *Shickle v. Watts*, (1888) 94 Mo. 410.

⁸ *McMaster v. Davidson*, 29 Hun,

⁴ *Wheeler v. Faurot*, 37 Ohio St. 26. 542.

cessors, only, can enforce the contract at law. There is no privity between the creditors of the corporation and its stockholders, and therefore no legal action can be maintained by the creditors to recover unpaid subscriptions.¹ A judgment creditor of a corporation, after execution returned unsatisfied, may sue in equity for himself and for such other creditors as may join him, making the corporation, and such of its delinquent stockholders as are within the jurisdiction, defendants, and may have an account taken and an order compelling payment by such stockholders; notwithstanding that a State statute provides a remedy at law against an individual stockholder to enforce contribution. If the stockholders are liable to the full amount of their unpaid subscriptions, an assessment before suit is unnecessary.² And a suit by a judgment creditor against stockholders of a corporation to compel payment of their unpaid subscriptions to the capital stock, can only be prosecuted by a creditor suing in behalf of all the creditors, making the corporation a party, and having a full accounting of all the assets of the corporation.³ A complaint filed by a creditor may be amended so that suit may be for the benefit of all the creditors who may choose to come in.⁴ But a creditor of an insolvent corporation can not, under an attachment execution against the corporation, enforce the liability of a single stockholder for an unpaid subscription. Unpaid subscriptions constitute a fund to be administered, in appropriate proceedings for the benefit of all the creditors generally.⁵ Thus creditors can bring their suit in equity against stockholders for unpaid amounts due on stock without

¹ 2 Morawetz on Corporations, § 818; *Cooper v. Frederick*, 9 Ala. 739, 742; *Patterson v. Lynde*, 106 U. S. 519; *Brown v. Fish*, 23 Fed. Rep. 228; *Jones v. Jarman*, 34 Ark. 323, 328; *Spear v. Grant*, 16 Mass. 9, 15. Cf. "Creditors versus Shareholders," 1 L. J. 540.

² *Holmes v. Sherwood*, 3 McCrary C. Ct. 405; s. c. 16 Fed. Rep. 725. Cf. "Liabilities & Rights of Corporate Debtors & Creditors," by E. Powell, 28 L. T. 316, 331, and 29 L. T. 14.

³ *Wetherbee v. Baker*, 35 N. J. Eq.

501. Under § 1077 of the Revised Statutes of Nevada, one or more may sue and defend for the benefit of all. *Thompson v. Reno Savings Bank*, (1885) 19 Nev. 103; s. c. 3 Am. St. Rep. 797.

⁴ *Thompson v. Reno Savings Bank*, (1885) 19 Nev. 103; s. c. 3 Am. St. Rep. 797.

⁵ *Lane's Appeal*, 105 Pa. St. 49; s. c. 51 Am. Rep. 166; *Minick v. Mingo Iron Works Co.*, 25 W. Va. 184.

attempting to procure a call to be made, and when the creditors are numerous, and a court of law can not adjust the claims, equity alone will relieve.¹ Under the General Manufacturing Act of New York the creditors of a corporation must exhaust their legal remedies against it before resorting to equity to enforce the payment of subscriptions.² This was the rule also under the earlier statute of 1811;³ and is re-enacted in the "Stock Corporation Law" of 1890.⁴

§ 699. The same subject continued.— Upon the question whether a stockholder who is also a creditor of the corporation has this remedy in equity there is some conflict of authority. In Massachusetts it is held that the stockholder has no such right.⁵ And in New York if the charter of the corporation makes the stockholders liable as partners, this rule is followed.⁶ And it is also held in New York that a stockholder who is a creditor may maintain a suit for an accounting of the assets of the corporation,⁷ and in the same State it seems that the assignee of a shareholder may bring the suit to enforce the statutory liability.⁸ In Pennsylvania and Maine the right of defendant stockholders to compel contribution to the payment of debts on which their liability has been en-

¹ *Thompson v. Reno Savings Bank*, (1885) 19 Nev. 171; s. c. 3 Am. St. Rep. 883.

² *Flash v. Conn*, (1883) 109 U. S. 371, 380; *Rocky Mountain Nat. Bank v. Bliss*, (1882) 89 N. Y. 338; *Mathez v. Neidig*, (1878) 72 N. Y. 100; *Southworth & Jones on Manuf. & Business Corporations*, § 107; *Weeks v. Love*, (1872) 50 N. Y. 568; *Abbott v. Aspinwall*, (1857) 26 Barb. 202; *Wiles v. Suydam*, (1876) 64 N. Y. 173; *Shellington v. Howland*, (1873) 53 N. Y. 371; *Handy v. Draper*, (1882) 89 N. Y. 334.

³ *Bank of Poughkeepsie v. Ibbotson*, (1840) 24 Wend. 473; *Van Hook v. Whitlock*, 3 Paige, 409; *Simonson v. Spencer*, (1836) 15 Wend. 548; N. Y. Rev. Stat. 282, Act of March 22, 1811.

⁴ N. Y. Laws of 1890, ch. 564, §§ 57, 58.

⁵ *Thayer v. Union Tool Co.*, (1855) 4 Gray, 75, *Potter v. Stevens Machine Co.*, (1879) 127 Mass. 592.

⁶ *Bailey v. Bancker*, (1842) 3 Hill, 188, overruling upon this point *Simonson v. Spencer*, (1836) 15 Wend. 548; *Beers v. Waterbury*, (1861) 8 Bosw. 396; *Richardson v. Abendroth*, (1864) 43 Barb. 162. *Contra*, *Sanborn v. Lefferts*, (1874) 58 N. Y. 179.

⁷ *Garrison v. Howe*, (1858) 17 N. Y. 458. *Cf.* *Slee v. Bloom*, (1821) 5 Johns. Ch. 382.

⁸ *Woodruff & Beach Iron Works v. Chittenden*, 4 Bosw. 406, to the point that an assignee in bankruptcy may maintain such a suit. See *Garrett v. Sayles*, (1880) 1 Fed. Rep. 371.

forced, by stockholders who have not been joined in the action, is a right existing only by statute and not in equity.¹

§ 700. Parties defendant.—The liability of a subscriber for the capital stock of a company is several and not joint. By his subscription each becomes a several debtor to the company, as much so as if he had given his promissory note for the amount of his subscription. At law, certainly, his subscription may be enforced against him without joinder of other subscribers, and in equity his liability does not cease to be several. A creditor's bill merely subrogates the creditor to the place of the debtor, and attaches the debt due to the debtor corporation. It does not change the character of the debt attached. It may be that, if the object of the bill is to wind up the affairs of this company, all the shareholders, at least so far as they can be ascertained, should be made parties, that complete justice may be done by equalizing the burdens, and in order to prevent a multiplicity of suits. The most that can be said is that the presence of all the stockholders might be convenient, not that it is necessary. When the only object of a bill is to obtain payment of one judgment against a corporation, out of its credits or intangible property, that is, out of its unpaid stock, there is no reason for requiring all the stockholders to be made defendants.² But when an attempt is made to enforce payment of all the corporate liabilities, all the solvent stockholders within the jurisdiction must be joined, except where this will be excused upon an allegation that the number is too great.³ And defendant stockholders may file a cross-bill to bring in all other delinquent stockholders within the jurisdiction of the court.⁴ For,

¹ *Brinham v. Wellersburg Coal Co.*, (1864) 47 Pa. St. 48; *Fowler v. Robinson*, (1850) 31 Me. 189. *Umstead v. Buskirk*, 17 Ohio St. 113; *Erickson v. Nesmith*, 46 N. H. 371; *Pierce v. Milwaukee &c. Co.*, (1875)

² *Strong, J.*, in *Hatch v. Dana*, 101 U. S. 205. Cf. "Liabilities of Shareholders in Joint-stock Companies," by S. S. P. Patterson, 6 Va. L. J. 579. 38 Wis. 253; *Carpenter v. Marine Bank*, 14 Wis. 705; *Coleman v. White*, (1862) 14 Wis. 700; *Bogardus v. Rosendale Manuf. Co.*, (1852) 7 N. Y.

³ *Vick v. Lane*, (1879) 56 Miss. 681; 147. *Walsh v. Memphis &c. R. Co.*, 2 ⁴ *Hatch v. Dana*, (1879) 101 U. S. 205; *Wood v. Dummer*, (1824) 3 Ma- 415; *Hadley v. Russell*, 40 N. H. 109; *son*, 307; *Marsh v. Burroughs*, (1871)

obviously, if all who are liable have not been made parties, those who have been can not be charged with the full liability unless it be shown that the absent ones are insolvent or beyond the jurisdiction of the court.¹ Where a corporation's articles provide for a capital stock of a certain amount, the stockholders to give for their subscriptions their notes without interest, not to be liable at any time to an assessment for more than half of their face, in case of insolvency the whole capital subscribed is liable to creditors. Thus if the corporation becomes bankrupt after a part is assessed and paid in, the stockholders are liable for the whole unpaid amount; and the balance unpaid being collected by the assignee, the fund is, on intervention, liable to the lien of attachments made before the declaration of bankruptcy.²

§ 701. The same subject continued.—In a suit in equity against stockholders who have not paid for their stock, where no evidence of the insolvency of any of them is presented, the

1 Woods, 463; *Holmes v. Sherwood*, 3 McCrary, 405; *Masters v. Rossie &c. Mining Co.*, 2 Sandf. Ch. 301; N. Y. Code of Civil Procedure, §§ 1791-1794; *Hadley v. Russell*, 40 N. H. 109; *Umsted v. Buskirk*, 17 Ohio St. 113; *Hodus v. Silver Hill Mining Co.*, 9 Oregon, 200.

¹ *Marsh v. Burroughs*, 1 Woods, 463; *Wood v. Dummer*, 3 Mason, 307; *Bonewitz v. Van Wert County Bank*, 41 Ohio St. 78. Cf. *Erickson v. Nesmith*, 46 N. H. 371; s. c. 77 Am. Dec. 78; *Holmes v. Sherwood*, 3 McCrary, 405. But under the General Laws of Colorado, § 201, providing that a stockholder in a corporation shall be liable for its debts to the extent of his unpaid stock, and section 212, providing that a suit in equity may be brought against a stockholder of a corporation that has dissolved, or ceased to do business, leaving debts unpaid, by joining the corporation and the stockholders in such suit, a complaint in an action

on an insurance policy joining the company and several stockholders as defendants, and alleging that the company had ceased to do business leaving debts unpaid, does not misjoin the parties, and a separate judgment may be rendered against a stockholder in the same suit. *Tabor v. Goss & Phillips Manuf. Co.*, (1888) 11 Colo. 419, holding also that under General Laws, § 212, requiring such joinder in case the corporation had ceased to do business leaving debts unpaid, the jurisdiction of the court to render judgment against the company and a separate judgment against the stockholder in the same suit having been established, there was no error in the admission of the policy and of the judgment against the company as evidence of damages, nor in the rendition of judgment against the stockholder.

² *In re Glen Iron Works*, 20 Fed. Rep. 674.

decree should be against each of them in proportion to his unpaid stock. On proof that some are insolvent, the solvent must pay the proportion due from the insolvent.¹ There is a class of cases in which it is held that it is not necessary to join all the stockholders as parties defendant, and that the suit may be instituted against any or all, leaving them to seek their remedy against those not joined by compelling them to contribute.² Some of these cases adopt a distinction between suits brought to wind up the corporation, and suits for the simple collection of a debt.³ The corporation itself should be made a party in these suits if it is in existence.⁴ But a corporation which has sold everything except its right to exist, and has no officers or place of business, is not a necessary party to a suit against a stockholder to make him liable for his unpaid subscription, although having power to reorganize and collect the stockholder's dues.⁵

§ 702. The corporation as a party defendant.—In a suit to enforce the statutory liability, the corporation is a necessary party.⁶ In a suit by the receiver of an insolvent corporation to recover an assessment upon its stock, ordered by the court by which the receiver was appointed, it is no defense that the defendant stockholder was not a party defendant in the proceedings for the appointment of a receiver; for the

¹ *Hodges v. Silver Hill Mining Co.*, 9 Oregon, 200.

² *Hatch v. Dana*, (1879) 101 U. S. 205; *Griffith v. Mangam*, 57 N. Y. 611; *Bartlett v. Drew*, (1874) 57 N. Y. 587; *Brundage v. Monumental &c. Mining Co.*, (1885) 12 Oregon, 322; *Marsh v. Burroughs*, (1871) 1 Woods, 463; *Holmes v. Sherwood*, (1881) 3 McCrary, 405; *Glenn v. Williams*, (1882) 60 Md. 93. Cf. *Von Schmidt v. Huntington*, (1850) 1 Cal. 55; *Lamar Ins. Co. v. Gulick*, (1882) 102 Ill. 41; *Wood v. Dummer*, (1824) 3 Mason, 307; *Bonewitz v. Van Wert Co. Bank*, (1884) 41 Ohio St. 78. Cf. *Erickson v. Nesmith*, (1860) 46 N. H. 371; *Ogilvie v. Knox Ins. Co.*, (1859) 22 How. 380.

³ *Hatch v. Dana*, (1879) 101 U. S. 205; *Bartlett v. Drew*, (1874) 57 N. Y. 587, 589, 591; *Bonewitz v. Van Wert Co. Bank*, 41 Ohio St. 78.

⁴ *Patterson v. Lynde*, 112 Ill. 196; *Coleman v. White*, 14 Wis. 700; *Perkins v. Sanders*, 56 Miss. 733.

⁵ *Wellman v. Howland Coal & Iron Works*, 19 Fed. Rep. 51.

⁶ *Nimick v. Mingo Iron Works Co.*, 25 W. Va. 184. Cf. "Remedies of Creditors against Companies apart from Provisions of the Winding-up Acts," by A. H. Marsh, 5 Can. L. T. 289, 352; *Mansfield Iron Works v. Willcox*, (1866) 52 Pa. St. 377. Cf. *Deming v. Bull*, (1835) 10 Conn. 409; *Middletown Bank v. Magill*, (1823) 5 Conn. 28.

fact that the corporation of which defendant was a member was a party to that suit, binds him.¹ A bill against a stockholder of a corporation, to which the company is a necessary party, brought in a federal court for a district other than that of which the company was a resident, can not be amended so as to bring the company in as a defendant, and is fatally defective.² So in an action against the stockholders of a certain corporation where complainant had purchased all the assets and properties of defendants' corporation under misrepresentations as to the value of the property, and the defendants, as stockholders, had received their proportionate shares of the proceeds of the sale and the other assets of the company which came into their hands as a trust fund for the satisfaction of complainant's claims, it was held that as the action was primarily against the vendor corporation for damages for fraudulent representations, it was a necessary party.³

§ 703. Statutory liability — (a) Parties plaintiff.— "The first thing to be determined in all such cases is, what liability has been created. There will always be difficulty in attempting to reconcile cases of this class, in which the general question of remedy has arisen, unless special attention is given to the precise language of the statute under consideration. The remedy must always be such as is appropriate to the liability to be enforced. The statute which creates the liability may declare the purposes of its creation, and provide directly or indirectly a remedy for its enforcement."⁴ Thus, under a charter provision that stockholders shall "be bound respectively for all debts of the bank in proportion to their stock holden therein," an action at law by a single creditor against a single stockholder will not lie;⁵ and this is the rule under a statute making the stock-

¹ *Great Western Tel. Co. v. Gray*, (1887) 122 Ill. 630.

² *Swan Land & Cattle Co. v. Frank*, (1889) 39 Fed. Rep. 456.

³ *Swan Land & Cattle Co. v. Frank*, (1889) 39 Fed. Rep. 456.

⁴ Chief Justice Waite, in *Terry v. Little*, (1879) 101 U. S. 216.

⁵ *Hatch v. Dana*, (1879) 101 U. S.

205; *Terry v. Little*, (1879) 101 U. S. 216; *Pollard v. Bailey*, (1874) 20 Wall. 520. Cf. *Wright v. McCormack*, (1866) 17 Ohio St. 86; *Sands v. Kimbark*, (1863) 37 Barb. 108, 120; *Cushman v. Shepard*, (1848) 4 Barb. 113; *Smith v. Huckabee*, (1875) 53 Ala. 191.

holders of a banking company "individually responsible to the amount of their respective share or shares of stock for all its indebtedness and liabilities of every description."¹ Upon the ground that at law the indebtedness of the corporation and the several liabilities of the members could not be equitably adjusted,² no one creditor can assume that he alone is entitled to what any stockholder owes, and sue at law, so as to appropriate it exclusively to himself;³ for a bill filed by the creditor against a corporation alleged to be insolvent, to compel the payment of unpaid capital stock, is an equitable proceeding to enforce the equitable obligations of stockholders.⁴ Under such a bill there must be an account of debts, assets and unpaid capital stock, and the proper assessment made on each stockholder of the amount due from him.⁵

§ 704. (b) **Parties defendant.**— If the members are liable as principals each is liable for the whole of the debts of the company to the amount of his statutory liability.⁶ When the equitable remedy is pursued, the corporation, and all the solvent shareholders within the jurisdiction who are known, should be made defendants. Contribution among the shareholders is of the essence of the proceeding, and that is best effected when all are made parties.⁷ And when the action is to enforce the

¹ *Coleman v. White*, (1862) 14 Wis. 700; *Carpenter v. Marine Bank*, (1862) 14 Wis. 705, n.

² *Allen v. Walsh*, (1879) 25 Minn. 543; *Jones v. Jarman*, (1879) 34 Ark. 323; *Low v. Buchanan*, (1879) 94 Ill. 76; *Flash v. Conn*, (1883) 109 U. S. 371; *Queenan v. Palmer*, (1886) 117 Ill. 62; s. c. 34 Alb. L. J. 117. Cf. *Stewart v. Lay*, (1877) 45 Iowa, 604; *Norris v. Johnson*, (1871) 34 Md. 485; *Faymonville v. McCullough*, (1881) 59 Cal. 285; *Garrison v. Howe*, (1858) 17 N. Y. 458; *Story v. Furman*, (1862) 25 N. Y. 214.

³ *Patterson v. Lynde*, (1882) 106 U. S. 519. Cf. *Terry v. Little*, (1879) 101 U. S. 216.

⁴ *Cover v. Manaway*, (1886) 115 Pa. St. 338; s. c. 2 Am. St. Rep. 552.

⁵ *Cover v. Manaway*, (1886) 115 Pa. St. 338; s. c. 2 Am. St. Rep. 552.

⁶ *Morley v. Thayer*, 3 Fed. Rep. 737; *Pollard v. Bailey*, 20 Wall. 520; *Lowry v. Inman*, 46 N. Y. 119; *Windham &c. Sav. Inst. v. Sprague*, 43 Vt. 502; *Allen v. Walsh*, 25 Minn. 543.

⁷ *Walsh v. Memphis &c. R. Co.*, 2 McCrary, 156; s. c. 6 Fed. Rep. 797; *Erickson v. Nesmith*, (1866) 46 N. H. 371; *Hadley v. Russell*, 40 N. H. 109; *Umsted v. Buskirk*, (1866) 17 Ohio St. 113; *Mansfield Iron Works v. Willcox*, (1866) 52 Pa. St. 377; *Brinham v. Wellsburg Coal Co.*, 47 Pa. St. 43; *Hoard v. Wilcox*, 47 Pa. St. 51; *McHose v. Wheeler*, 45 Pa. St. 32.

statutory liability to employees, "laborers, servants, and apprentices," in New York, all the shareholders should be made parties.¹ But the joinder of all the shareholders may be dispensed with in a case where it is shown to be impracticable.² Accordingly when the complaint avers that defendants and others whose names were unknown, are stockholders, and that it is impracticable from their great number to bring them all before the court, it is not demurrable for defect of parties.³ But in an action to enforce the individual liability of stockholders, some of whom, without any excuse therefor, are not served with process, it is error to assess those served with the whole indebtedness.⁴ It is sometimes held that a general statutory liability means a liability on the part of the stockholder only in the proportion which his interest bears to the total indebtedness of the corporation.⁵ In such a case, where the shareholders are jointly and severally personally liable for debts contracted by the corporation, which it can not or does not pay, in proportion to the number of shares they own, it seems to be settled that they are to be held principal debtors, and not mere sureties for the corporation.⁶ It is sometimes held also that stockholders are not sureties for each other.⁷ But in Michigan the contrary rule prevails.⁸ Where an action at law can be brought, and the member's liability is limited and several, each being liable for a definite sum, a separate action may be brought against each.⁹ In New York, under

¹ *Strong v. Wheaton*, 38 Barb. 616; 17 La. Rep. 397. Cf. "Liability of a Reporter of a Newspaper a Laborer," 17 Am. L. Reg. N. S. 97.

² *Bronson v. Wilmington N. C. Life Ins. Co.*, (1882) 85 N. C. 411; *Unsted v. Buskirk*, (1866) 17 Ohio St. 113; *Pierce v. Milwaukee Construc. Co.*, (1875) 38 Wis. 253; *Coleman v. White*, 14 Wis. 700; *Crease v. Babcock*, 10 Metc. 525; *Brundage v. Monumental &c. Mining Co.*, (1885) 12 Oregon, 322.

³ *Bronson v. Willmington N. C. Life Ins. Co.*, 85 N. C. 411.

⁴ *Bonewitz v. Van Wert County Bank*, 41 Ohio St. 78.

⁵ *Boyd v. Hall*, (1876) 56 Ga. 563; *Reynolds v. Feliciana Steamboat Co.*,

17 La. Rep. 397. Cf. "Liability Laws," 5 Am. Jur. 52.

⁶ *Moss v. Averell*, (1853) 10 N. Y. 450; *Corning v. McCullough*, (1847) 1 N. Y. 47; *Simonsen v. Spencer*, (1836) 15 Wend. 548; *Bailey v. Bancker*, (1842) 3 Hill, 188; *Harger v. McCullough*, 5 Denio, 119; *Southmayd v. Russ*, 3 Conn. 52; *Marcy v. Clark*, 17 Mass. 330.

⁷ *Taylor on Corporations*, §§ 714, 715; *Lane v. Harris*, 16 Ga. 217, 234; *Young v. Rosenbaum*, 39 Cal. 646; *Crease v. Babcock*, 10 Metc. 525.

⁸ *Hanson v. Donkersley*, 37 Mich. 184. Cf. *Grand Rapids Savings Bank v. Warren*, 53 Mich. 157.

⁹ *Terry v. Little*, (1879) 101 U. S.

the Business Corporations Act of 1875,¹ providing that stockholders in "full liability companies" may be joined as defendants in any action against the company, it is held that it does not, by implication, prohibit separate and concurrent actions against a "limited liability company" and a stockholder therein.² In a case in the United States Supreme Court against a corporation it was held that the shareholders might properly be made parties, in order to avoid a multiplicity of suits. But in this case they were immediately liable under that provision of their charter which made members of the company jointly and severally liable for all debts and contracts made by the company until the whole amount of the capital stock fixed and limited by the corporation is paid in.³ Where the shareholder's liability is held to be like that of a partner, then all must be joined as defendants, and the omission of any one is ground for a plea in abatement.⁴ In Massachusetts stockholders in manufacturing corporations are liable as tenants in common to creditors, to the extent of the capital stock, until it has been divided into shares;⁵ but where some of the stock is held by the corporation itself, this will not compel the other shareholders to bear the statutory liability as to the stock so held by the corporation.⁶ In Pennsylvania, under the Manufacturing Companies Act, the corporate creditor proceeds against the shareholders in an action at law upon the original contract, making the corporation and all the shareholders

216; *Garrison v. Howe*, (1858) 17 N. Y. 458; *Paine v. Stewart*, (1866)

33 Conn. 516; *Culver v. Third National Bank*, (1871) 64 Ill. 528; *Bank of Poughkeepsie v. Ibbotson*, (1840) 24 Wend. 473; *Perry v. Turner*, 55 Mo. 418; *Boyd v. Hall*, (1876) 56 Ga. 563; *Jones v. Wiltberger*, 42 Ga. 575; *Lane v. Harris*, (1854) 16 Ga. 217; *Abbott v. Aspinwall*, (1857) 26 Barb. 202; *Pettibone v. McGraw*, (1859) 6 Mich. 441; *In re Hollister Bank*, (1863) 27 N. Y. 393. *Cf. Pratt v. Bacon*, (1830) 10 Pick. 122; *Milroy v. Spurr Mountain Iron Mining Co.*, (1880) 43 Mich. 231.

¹ N. Y. Laws of 1875, ch. 611.

² *Walton v. Coe*, (1888) 110 N. Y. 109.

³ *Manufacturing Co. v. Bradley*, (1881) 105 U. S. 175.

⁴ *Allen v. Sewall*, (1829) 2 Wend. 327; *Strong v. Wheaton*, (1861) 38 Barb. 616; *Reynolds v. Feliciana Steamboat Co.*, (1841) 17 La. Rep. 397; *Bonewitz v. Bank*, 41 Ohio St. 78. *Cf. Dodge v. Minnesota &c. Slate Roofing Co.*, (1871) 16 Minn. 368; *Culver v. Third National Bank*, (1871) 64 Ill. 528; *Branson v. Oregonian Ry. Co.*, (1882) 10 Oregon, 278.

⁵ *Hawes v. Anglo-Saxon Petroleum Co.*, 101 Mass. 385; s. c. (1872) 111 Mass. 200.

⁶ *Crease v. Babcock*, 10 Metc. 525.

parties defendant.¹ In Illinois, under the charter provision that "each stockholder shall be liable to double the amount of stock" owned, it is held that the stockholders are severally and individually liable; that is, that an action at law against one or all of them would lie.² In Ohio, although the stated extent of the shareholder's liability as provided by the statute can not be exceeded, still, up to the full measure of his liability, he may be charged, although it be shown that if other solvent shareholders had contributed their full proportion it would not be necessary for him to pay.³ In Wisconsin, stockholders in banking corporations are liable, by statute, as original and principal debtors, substantially as though they were partners, except, as in Ohio, that the responsibility of each is limited to a sum equal to his shares of stock.⁴ In Vermont, a provision that shareholders "shall be personally holden" is held to create only a joint liability.⁵

§ 705. Effect of transfer of shares — (a) The transferrer's liability thereafter.—A transfer of stock, consummated in good faith upon the books of the corporation, relieves the transferrer from all liability to the corporation or its creditors, thereafter becoming due upon his subscription,⁶ except where personal liability is imposed by statute. But the transferrer will not be thus relieved unless the transaction is registered on the company's books, notwithstanding the fact that the transfer is in writing and the assignee has drawn divi-

¹ *Brinham v. Wellersburg Coal Co.*, (1864) 47 Pa. St. 43; *Mansfield Iron Works v. Willcox*, (1866) 52 Pa. St. 377; *Hoard v. Wilcox*, 47 Pa. St. 51; *McHose v. Wheeler*, 45 Pa. St. 32; *Patterson v. Wyoming Manuf. Co.*, 40 Pa. St. 117.

² *Thebus v. Smiley*, 110 Ill. 316; *Hull v. Burtis*, 90 Ill. 213; *McCarthy v. Lavasche*, 89 Ill. 270; *Fuller v. Ledden*, 87 Ill. 310; *Jacobson v. Allen*, (1882) 12 Fed. Rep. 454.

³ *Brown v. Hitchcock*, 36 Ohio St. 678. *Cf. Stewart v. Lay*, (1877) 45 Iowa, 604; "Individual Liability of Stockholders in Iowa Corporations," 14 West. Jur. 337, 385, 433.

⁴ *Coleman v. White*, 14 Wis. 700; *Carpenter v. Marine Bank*, 14 Wis. 705, n.

⁵ *Windham Prov. Sav. Inst. v. Sprague*, (1871) 43 Vt. 502.

⁶ *Allen v. Montgomery R. Co.*, 11 Ala. 457; *Billings v. Robinson*, (1882) 94 N. Y. 415; *Bowden v. Johnson*, (1882) 107 U. S. 251; *Davis v. Stevens*, (1879) 17 Blatchf. 259. *Cf. Sawyer v. Hoag*, 17 Wall. 610; *Johnson v. Southwestern R. Bank*, 3 Strobh. Eq. (S. C.) 263; *Melvin v. Lamar Ins. Co.*, (1875) 80 Ill. 446; *Zirkel v. Joliet Opera House Co.*, (1875) 79 Ill. 334; *Adderly v. Storm*, 6 Hill, 624.

dends on the stock. A transfer to have such an effect, however, must be made in good faith, and not to an irresponsible person to escape liability, in harmony with the principle that the capital stock, including both paid and unpaid subscrip-

¹Cutting v. Damerel, (1882) 88 N. Y. 410; Isham v. Buckingham, 49 N. Y. 216; Strange v. Houston & T. C. R. Co., (1880) 53 Tex. 162; Upton v. Burnham, (1873) 3 Biss. 431, 520; McEuen v. West London Wharves &c. Co., (1871) L. R. 6 Ch. 655; Midland &c. Ry. Co. v. Gordon, (1847) 16 Mees. & W. 804; Sayles v. Blane, (1849) 19 L. J. Q. B. 19; Cartmell's Case, (1874) L. R. 9 Ch. 691; Heritage's Case, (1869) L. R. 9 Eq. 5; Hennessey's Executor's Case, (1850) 3 De G. & Sm. 191; *Ex parte* Henderson, (1854) 19 Beav. 107; Bank v. Lanier, (1870) 11 Wall. 369. *Contra*, Bargate v. Shortridge, 5 H. L. Cas. 297; Evans v. Smallcombe, (1868) L. R. 3 House of Lords, 249; *In re* Bachman, (1875) 12 Nat. Bank. Reg. 223. *Cf.* Head's Case, L. R. 3 Eq. 84; White's Case, L. R. 3 Eq. 86; Shepherd's Case, L. R. 2 Ch. 16; Straffon's Executor's Case, 1 De G., M. & G. 576. Va. Code of 1860, ch. 57, § 24, relating to assignments of stock, provides that in any assignment the assignee and assignor shall each be liable for any unpaid installments which may have accrued or may thereafter accrue. Va. Acts of 1883-84, p. 654, ch. 472, authorizing compromises to be made by fiduciaries with debtors of the company, provides that the compromise made with any person claimed to be liable to the company shall not impair the liability to the company of any other person, on account of the cause of liability, but the amount so received shall be credited on the same, except, when the liability is joint, it shall be credited with the full share of the person released.

And it was held that a release of the assignor of stock by the trustee of an insolvent corporation, on payment of a certain amount on account of unpaid installments, does not discharge the assignee, the liability not being joint. Glenn v. Foote, 36 Fed. Rep. 824. And where certificates of stock issued by the directors provide that the shares shall be transferred only on the books of the corporation, it was held, in an action by the receiver, that one in whose name the shares stood on the books, but who had sold and delivered his certificate to another, was not liable as a "stockholder" for debts, within New York Laws, 1867, ch. 474. Cutting v. Damerel, 88 N. Y. 410. Where a shareholder of a national bank makes a *bona fide* sale of his stock, and goes with the purchaser to the bank, indorses the certificate and delivers it to the cashier of the bank, with directions to make the transfer on the books, he has done all that is incumbent upon him to discharge his liability, and he is not liable, although the cashier failed to make the transfer, upon the subsequent suspension of the bank, for an assessment made by the comptroller of the currency, under U. S. Rev. Stat., § 5151, to pay the bank's debts. Hayes v. Shoemaker, 39 Fed. Rep. 319. Under Rev. Stat. Me., ch. 46, §§ 45-47, making stockholders liable to judgment creditors of a corporation to the extent of their unpaid subscriptions, where defendant transferred all the stock subscribed for by him, except four hundred shares, prior to the date when the judgment cred-

tions, is a trust fund for the benefit of creditors, and that it is inconsistent with the nature of such a trust to permit a transfer of stock to be made to one who is insolvent, for the purpose of escaping liability.¹ And this rule also applies to cases where stockholders are made personally liable by statute.²

itor's original cause of action against the corporation was contracted, defendant is liable only for the balance remaining unpaid upon those four hundred shares, and not upon the additional one thousand shares which he purchased in open market, and which were issued by the corporation as fully paid stock. *Libby v. Tobey*, (Me. 1890) 19 *Atlan. Rep.* 904.

¹ *Rider v. Morrison*, 54 *Md.* 429; *Thompson's Liability of Stockholders*, §§ 211, 215; *Morawetz on Corporations*, § 858; *Nathan v. Whitlock*, 3 *Edw. Ch.* 215; *s. c.* (1841) 9 *Paige*, 152; *Veiller v. Brown*, (1879) 18 *Hun*, 571; *Miller v. Great Republic Ins. Co.*, (1872) 50 *Mo.* 55; *McLaren v. Franciscus*, 43 *Mo.* 452; *Mandion v. Fireman's Ins. Co.*, 11 *Rob. (La.)* 177; *In re Bachman*, (1875) 12 *Nat. Bank. Reg.* 223; *Central Agric. &c. Assoc. v. Alabama Gold Life Ins. Co.*, (1881) 70 *Ala.* 120; *Gaff v. Flesher*, (1877) 33 *Ohio St.* 107; *Union Mut. Ins. Co. v. Frear Stone Manuf. Co.*, (1881) 97 *Ill.* 537, 549; *Douchy v. Brown*, 24 *Vt.* 197; *Aultman's Appeal*, (1881) 98 *Pa. St.* 505; *Everhart v. West Chester &c. R. Co.*, (1857) 28 *Pa. St.* 339; *Paine v. Stewart*, (1866) 33 *Conn.* 516; *Bowden v. Santos*, (1877) 1 *Hughes*, (U. S.) 158; *Johnson v. Laffin*, (1878) 5 *Dill.* 65; *s. c.* 6 *Cent. L. J.* 124; *Wehrman v. Reakirt*, (1871) 1 *Cin. Super. Ct. Rep.* 230; *National Bank v. Case*, (1878) 99 *U. S.* 628, 632; *Provident Springs Savings Inst. v. Jackson Place Skating &c. Rink*, (1873) 52 *Mo.* 557; *Chouteau Spring Co. v. Harris*, 20 *Mo.* 382; *Roman v.*

Fry, 5 *J. J. Marsh.* 634; *Allibone v. Hager*, 46 *Pa. St.* 48; *Marcy v. Clark*, 17 *Mass.* 330. He may, however, transfer to an irresponsible person upon guarantying the payment of calls about to be made. *William's Case*, (1875) 1 *Ch. Div.* 576; *King's Case*, (1871) *L. R.* 6 *Ch.* 197; *Chynoweth's Case*, (1880) 15 *Ch. Div.* 13; *Harrison's Case*, (1871) *L. R.* 6 *Ch.* 236; *Master's Case*, (1872) *L. R.* 7 *Ch.* 292; *Hakim's Case*, (1872) *L. R.* 7 *Ch.* 296 *n.*; *Bishop's Case*, (1872) *L. R.* 7 *Ch.* 296; *De Pass's Case*, 4 *De G. & J.* 544; *Weston's Case*, *L. R.* 4 *Ch.* 20; *Jessopp's Case*, (1858) 2 *De G. & J.* 638; *In re Taurine Co.*, (1883) *L. R.* 25 *Ch. Div.* 118; *Moore v. McLaren*, (1862) 11 *Up. Can. C. P.* 534; *Baltie's Case*, (1870) 39 *L. J. Ch.* 391. *Cf.* *Bunn's Case*, 2 *De G., F. & J.* 275.

² *Magruder v. Colston*, (1875) 44 *Md.* 349; *Paine v. Stewart*, 33 *Conn.* 516; *Holyoke Bank v. Burnham*, 11 *Cush.* 183; *Chapman v. Shepherd*, (1867) *L. R.* 2 *C. P.* 228; *Miller v. Great Republic Ins. Co.*, (1872) 50 *Mo.* 55; *Billings v. Robinson*, (1884) 94 *N. Y.* 415; *s. c.* (1882) 28 *Hun*, 122; *Mann's Case*, (1868) *L. R.* 3 *Ch.* 459, *n.*; *Mitchell's Case*, (1870) *L. R.* 9 *Eq.* 363; *Ex parte Hatton*, (1862) 31 *L. J. Ch.* 340; *Pugh & Sharman's Case*, (1872) *L. R.* 13 *Eq.* 566; *Lankester's Case*, (1871) *L. R.* 6 *Ch.* 905, *n.*; *Gilbert's Case*, (1870) *L. R.* 5 *Ch.* 559. *Cf.* *Castellan v. Hobson*, (1870) *L. R.* 10 *Eq.* 47; *Maynard v. Eaton*, (1874) *L. R.* 9 *Ch.* 414; *Colquhoun v. Courtenay*, (1874) 43 *L. J. Ch.* 338; *Richardson's Case*, (1875) *L. R.* 19 *Eq.* 588.

§ 706. (b) **The transferrer's statutory liability.**—The rule that a transferrer of stock is not relieved of his liability until the transfer has been made upon the books of the company applies equally to the common-law liability and to the personal liability created by statute when the statute relieves him of liability upon his transfer of his stock.¹ And in order to hold a stockholder liable personally under the statute it is not necessary that any certificates should have been issued to him.² According to the rule laid down in the construction of statutes making "the stockholders" liable for debts, that the term refers only to those who were stockholders at the time the debt was contracted, a stockholder can not of course relieve himself of liability by transferring his stock.³ Under some statutes, as was seen in the preceding section, a stockholder may be relieved of liability on a debt when he ceases to be a stockholder before it becomes due or before an action is brought for its collection.⁴ He can not be released from

¹ *Johnson v. Laffin*, (1878) 5 Dill. 65; *Crease v. Babcock*, 10 Metc. 525; *Grew v. Breed*, 10 Metc. 569; *Holyoke Bank v. Burnham*, 11 Cush. 183; *Shellington v. Howland*, (1873) 53 N. Y. 371; *Johnson v. Underhill*, (1873) 52 N. Y. 203; *In re Empire Bank*, 18 N. Y. 200; *Veiler v. Brown*, (1879) 18 Hun, 571; *Richardson v. Abendroth*, 43 Barb. 162; *Worrall v. Judson*, 5 Barb. 210; *Adderly v. Storm*, 6 Hill, 624; *Dane v. Young*, (1872) 61 Me. 160; *Skowegan Bank v. Cutler*, (1860) 49 Me. 315; *Fowler v. Ludwig*, 34 Me. 455; *Stanley v. Stanley*, 26 Me. 191; *State v. Ferris*, (1875) 42 Conn. 560. See also cases cited in note 2, p. 1105, *supra*.

² *Chaffin v. Cummings*, 37 Me. 76; *Burr v. Wilcox*, 22 N. Y. 551; *Wheeler v. Miller*, 90 N. Y. 353; *Mokelumne Hill Canal &c. Co. v. Woodbury*, 14 Cal. 265; *Moss v. Oakley*, 2 Hill, 265; *Judson v. Rossie-Galena Co.*, 9 Paige, 598; *McCullough v. Moss*, 5 Denio, 567; *Chesley v. Pierce*, 32 N. H. 388; *Castleman v. Holmes*, 4 J. J. Marsh. 1; *Mill*

Dam Foundry v. Hovey, 21 Pick. 417; *Holyoke Bank v. Burnham*, 11 Cush. 183; *Southmayd v. Russ*, 3 Conn. 52; *Williams v. Hanna*, (1872) 40 Ind. 535; *Larrabee v. Baldwin*, 35 Cal. 155. *Cf. Roosevelt v. Brown*, 11 N. Y. 148; *Cutting v. Damerel*, (1882) 88 N. Y. 410.

³ *Wehman v. Reakirt*, 1 Cin. Sup. Ct. Rep. 230; *Mitchell's Case*, (1879) L. R. 4 App. Cas. 548; *Weston's Case*, (1868) L. R. 4 Ch. 20, 30; *Ex parte Parker*, (1867) L. R. 2 Ch. 685; *Chappell's Case*, (1871) L. R. 6 Ch. 902.

⁴ *Bond v. Appleton*, 8 Mass. 472; *Longley v. Little*, 26 Me. 162; *Nixon v. Green*, 25 L. T. Ex. 209; *Dodgson v. Scott*, 2 Ex. 457; *McClaren v. Franciscus*, 43 Mo. 452; *Douchy v. Brown*, 24 Vt. 197. *Cf. Deming v. Bull*, 10 Conn. 40; *Middletown Bank v. Magill*, 5 Conn. 28; *Child v. Coffin*, 17 Mass. 64; *Curtis v. Harlow*, 12 Metc. 3; *Southmayd v. Russ*, 3 Conn. 52; *Kickalls v. Eaton*, (1871) 23 L. T. (N. S.) 689; *Hawkins v. Maltby*, (1867) L. R. 3 Ch. 188.

liability, however, by means of an agreement with the directors.¹ A vendor of stock may compel his vendee to do everything necessary to be done by the latter to consummate the transfer of the stock, and to indemnify him on account of his liability as a stockholder.²

¹ *Ex parte* Parker, (1867) L. R. 2 Ch. 685; *Gilbert's Case*, (1870) L. R. 5 Ch. 559; *Allen's Case*, (1873) 16 Eq. 449; *Ex parte* Brown, 19 Beav. 97; *Nickalls v. Merry*, (1875) L. R. 7 H. L. 530; *Brown v. Black*, (1873) L. R. 8 Ch. 939; *Mann's Case*, L. R. 3 Ch. 458, n.; *Eyre's Case*, 31 Beav. 177; *Bennett's Case*, 5 De G., M. & G. 284; *Munt's Case*, 22 Beav. 55. Cf. *Johnson v. Laffin*, (1878) 5 Dill. 65, 81; *Case of the Reciprocity Bank*, 22 N. Y. 9; *Symon's Case*, (1870) L. R. 5 Ch. 298; *Weston's Case*, (1870) L. R. 5 Ch. 614; *Curtis' Case*, L. R. 6 Eq. 455; *Castello's Case*, L. R. 8 Eq. 504; *Walsh v. Union Bank*, (1879) 5 Quebec L. R. 289.

² *Johnson v. Underhill*, (1873) 52 N. Y. 203; *Kellogg v. Stockwell*, 75 Ill. 68; *Wheeler v. Faurot*, (1881) 37 Ohio St. 26; *Brown v. Hitchcock*, (1881) 36 Ohio St. 667; *Paine v. Hutchinson*, (1866) L. R. 3 Eq. 257; *Shaw v. Fisher*, 5 De G., M. & G. 596; *Cheale v. Kenward*, 3 De G. & J. 27; *Cape's Case*, (1852) 2 De G., M. & G. 562; *Grissell v. Bristowe*, L. R. 3 C. P. 112; *Kellock v. Enthoren*, (1873) L. R. 9 Q. B. 241; *Bowring v. Shepherd*, (1871) L. R. 6 Q. B. 309; *Allen v. Graves*, (1870) L. R. 5 Q. B. 478; *Shaw v. Rowley*, 16 Mees. & W. 810; *Sayles v. Blayne*, 14 Q. B. 205; *Coles v. Bristowe*, (1868) L. R. 4 Ch. 3; *Humble v. Langston*, 7 Mees. & W. 517; *Wynne v. Price*, 3 De G. & Sm. 310; *Morris v. Cannan*, 4 De G., F. & J. 581; *Hawkins v. Maltby*, L. R. 4 Ch. 200; *Butler v. Cumpston*, L. R. 7 Eq. 16; *Evans v. Wood*, L. R. 5 Eq. 9; *Cruse v. Paine*, L. R. 6 Eq. 641; s. c. 4 Eq. 441; *James v. May*, L. R. 6 House of Lords, 328; *Webster v. Upton*, (1875) 91 U. S. 65; *Castellan v. Hobson*, (1870) L. R. 10 Eq. Cas. 47. For further information on this subject see the following: *Brewster v. Hartley*, 37 Cal. 15; *Jackson v. Sligo Manuf. Co.*, (1878) 1 Lea, 210; *Allen v. Montgomery R. Co.*, 11 Ala. 437; *Graff v. Pittsburgh & c. R. Co.*, (1858) 31 Pa. St. 489; *Chubb v. Upton*, (1877) 95 U. S. 665; *Mann v. Currie*, 2 Barb. 294; *Isham v. Buckingham*, (1872) 49 N. Y. 216; *Chambersburg Ins. Co. v. Smith*, 11 Pa. St. 120; *Murray v. Bush*, (1873) L. R. 6 H. of L. 37; *Taylor v. Hughes*, 2 Jones & Lat. (Irish Ch.) 24; *Upham v. Burnham*, (1873) 3 Biss. 431; *Bernard's Case*, 5 De G. & Sm. 283; *Pittsburgh & c. R. Co. v. Clarke*, (1875) 29 Pa. St. 146; *Messersmith v. Sharon Savings Bank*, (1880) 96 Pa. St. 440; *Palmer v. Ridge Mining Co.*, 34 Pa. St. 288; *Frank's Oil Co. v. McCleary*, 63 Pa. St. 317; *Pittsburgh Iron Co. v. Otterson*, (1878) 4 Week. Notes Cas. 545; *Delaware Canal Co. v. Sansom*, 1 Binn. 70. Cf. *West Philadelphia Canal Co. v. Innes*, 3 Whart. 198; *Mitchell v. Beekman*, 64 Cal. 117; s. c. 16 Rep. 586; *Agricultural Bank v. Wilson*, (1844) 24 Me. 273; *Merrimac Mining Co. v. Levy*, 54 Pa. St. 227; *Aultman's Appeal*, (1881) 98 Pa. St. 505; *Marlborough Manuf. Co. v. Smith*, 2 Conn. 579; *Louisiana Ins. Co. v. Gordon*, 8 La. Rep. 174; *Midland & c. Ry. Co. v. Gordon*, 16 Mees. & W. 804; *Brigham v. Mead*, 10 Allen, 245; *Walker v. Bartlett*, 18 C. B. 845; *Watson v. Eales*, 23 Beav. 294;

§ 707. (c) **The transferee's common-law liability.**—A person may become a stockholder in a corporation either by original subscription, by direct purchase from the corporation or by subsequent transfer from the original holders, and stockholders are equally liable for unpaid subscriptions whether they become owners of shares by original subscription, or by subsequent transfer;¹ it being well settled that an express promise to pay the unpaid balance of the subscription is not necessary to hold the original subscriber or the subsequent transferee liable thereon.² For the acceptance and holding of shares in a corporation makes the holder liable to the responsibilities of a shareholder. So "if the law implies a promise by the original subscribers to pay the full par value when it may be called, it follows that an assignee of the stock when he has come into privity with the company by having stock transferred to him on the company's books is equally liable."³ Accordingly, where stock has been transferred and the transferee has been accepted as a stockholder and entered as such upon the books of the company, he becomes liable for the

McCreedy v. Rumsey, 6 Duer, 574; *In re Bachman*, (1875) 12 Bankr. Reg. 223.

¹ *Webster v. Upton*, (1875) 91 U. S. 65; *Ward v. Griswoldville Manuf. Co.*, 16 Conn. 593.

² *Upton v. Tribilcock*, 91 U. S. 45.

³ *Story, J.*, in *Webster v. Upton*, 91 U. S. 65; *Cole v. Ryan*, 52 Barb. 168; *Isham v. Buckingham*, (1872) 49 N. Y. 216; *Burke v. Smith*, (1872) 16 Wall. 390; *Brigham v. Meade*, 10 Allen, 245; *Thorp v. Woodhull*, 1 Sandf. Ch. 411; *Upton v. Burnham*, (1873) 3 Biss. 431, 520; *First Nat. Bank v. Gifford*, 47 Iowa, 575, 583; *Johnson v. Laffin*, (1878) 5 Dill. 65; *Huddersfield Canal Co. v. Buckley*, (1796) 7 Term Rep. 96; *Executors of Gilmore v. Bank of Cincinnati*, 8 Ohio, 62, 71; *Billings v. Robinson*, (1884) 94 N. Y. 415; *Wakefield v. Fargo*, (1882) 90 N. Y. 213; *Cowle v. Cromwell*, 25 Barb. 413; *Chouteau Spring Co. v. Harris*, 20 Mo. 382;

Miller v. Great Republic Ins. Co., 50 Mo. 55; *Allen v. Montgomery R. Co.*, 11 Ala. 437, 451; *Haynes v. Palmer*, 13 La. Ann. 240; *Hartford &c. R. Co. v. Boorman*, 12 Conn. 530; *Bend v. Susquehanna Bridge &c. Co.*, 6 Harr. & J. 128; *Hall v. United States Ins. Co.*, 5 Gill, (Md.) 484; *Aylesbury Ry. Co. v. Mount*, (1842) *Scott's New Rep.* 127; *Weston's Case*, L. R. 4 Ch. 20. Cf. *McKenzie v. Kittridge*, (1874) 24 U. C. C. P. 1; *Provincial Ins. Co. v. Shaw*, 19 U. C. Q. B. 533; *Wintringham v. Rosenthal*, (1881) 25 Hun, 580; *Shellington v. Howland*, (1873) 53 N. Y. 371; *Waterhouse v. Jamieson*, L. R. 2 Sc. App. 29; *Spargo's Case*, (1873) L. R. 8 Ch. 407; *In re Hoylake Ry. Co.*, (1874) 9 Ch. 257; *In re European Bank, Master's Case*, (1872) 41 L. J. Ch. 501; *Midland &c. Ry. Co. v. Gordon*, 5 Ry. & Canal Cases, 76; s. c. 16 Mees. & W. 804.

unpaid balance upon the stock, whether or not he assented to the registration or knew of it;¹ and he is sometimes made liable by statute for the debts of the corporation even before his transfer is recorded.² But if the name of an individual wrongly appears upon the books of a corporation as a stockholder he is entitled to show that it is there without right.³

§ 708. (d) **The transferee's statutory liability.**—It is well settled that the registration of a transfer upon the books of the company imposes upon the transferee the obligation to pay any sum due upon the stock, even though he hold the stock as trustee for another, or as collateral security, for the books of the corporation are *prima facie* evidence of the ownership of the stock;⁴ and this is also the case where stock-

¹ Webster v. Upton, (1875) 91 U. S. 65; Upton v. Burnham, (1873) 3 Biss. 520; London &c. Ry. Co. v. Fairclough, 3 Man. & G. 674, 703.

² Thus in New York, "no transfer of stock shall be valid for any purpose whatever, except to render the person to whom it shall be transferred liable for the debts of the company, according to the provisions of this act, until it shall have been entered therein (*i. e.*, in the corporate stock book) as required by this section, by an entry showing to and from whom transferred." New York Laws of 1848, ch. 40, § 25; Herries v. Platt, (1878) 13 Hun, 492; Johnson v. Underhill, (1873) 52 N. Y. 203; Shellington v. Howland, 53 N. Y. 371; Roosevelt v. Brown, 11 N. Y. 148; Wotrall v. Judson, 5 Barb. 210; Dane v. Young, 61 Me. 160; Davis v. Essex &c. Society, (1877) 44 Conn. 582; Kellogg v. Stockwell, 75 Ill. 68; London &c. Ry. Co. v. Fairclough, (1841) 2 Man. & G. 674; Humble v. Langston, 7 Mees. & W. 517; McEuen v. West London Wharves &c. Co., L. R. 6 Ch. 655; Sayles v. Blane, 19 L. J. Q. B. 19.

³ Webster v. Upton, 91 U. S. 65; *In re Reciprocity Bank*, 22 N. Y. 9;

Birch's Case, 2 De G. & J. 10; Fox's Case, 3 De G., J. & S. 465; Higg's Case, 2 Hem. & M. 657; Somerville's Case, (1870) L. R. 6 Ch. 266; Bullock v. Chapman, 2 De G. & Sm. 211; Colquhoun v. Courtenay, (1874) 43 L. J. Ch. 338; Emerson's Case, L. R. 1 Ch. 433; Fyfe's Case, (1869) L. R. 4 Ch. 768; s. c. (1870) L. R. 9 Eq. 589; Nation's Case, (1866) L. R. 3 Eq. 77; Hill's Case, (1869) L. R. 4 Ch. 769, note; Ward & Garfit's Case, (1867) L. R. 4 Eq. 189; Ward's Case, (1866) L. R. 2 Eq. 266; *Ex parte Henderson*, (1854) 19 Beav. 107; Shortridge v. Bosanquet, (1852) 16 Beav. 84; White's Case, (1866) L. R. 3 Eq. 1866.

⁴ Turnbull v. Payson, 95 U. S. 418; Franklin Glass Co. v. Alexander, 2 N. H. 380; s. c. 9 Am. Dec. 92; Bend v. Susquehanna Bridge Co., 6 Harr. & J. 128; Merrimac Mining Co. v. Bagley, 14 Mich. 501; Brigham v. Mead, 10 Allen, 245; Seymour v. Sturges, 26 N. Y. 134; Webster v. Upton, 95 U. S. 65; Pullman v. Upton, 96 U. S. 328; Upton v. Hansbrough, (1873) 3 Biss. 417; Foreman v. Bigelow, (1878) 4 Cliff. 508; Cole v. Ryan, (1868) 52 Barb. 168; Mann v. Currie, 2 Barb. 294; Hall v. United States Ins. Co., 5

holders are made personally liable by statutory provisions.¹ Inasmuch as the personal liability of stockholders exists only by statute and is a contract liability, the extent to which a transferee of stock is bound for corporate debts must be determined by reference to the particular statutes governing corporations. Where the charter or statute simply provides that "the stockholders" shall be personally liable for the debts of the corporation, it has been construed to mean that the liability attaches only to those who held that position at the time the debt was contracted, and not to those who subsequently became stockholders.² In other cases, where charters or statutes provide that upon the return, unsatisfied, of an execution against the property of the corporation, the stockholders shall be liable, it has been held that the liability attached to those who were members of the corporation at the time of the commencement of the action.³ In another class

Gill, (Md.) 484; Hartford &c. R. Co. v. Boorman, 12 Conn. 520; Moore v. Jones, (1877) 3 Woods, 53; *In re* South Mountain &c. Mining Co., (1881) 7 Sawyer, 30; Merrimac Mining Co. v. Levy, (1867) 54 Pa. St. 227; Huddersfield Canal Co. v. Buckley, 7 Term Rep. 96; Evans v. Wood, (1868) 37 L. T. Ch. 159.

¹ Irons v. Manufacturers' Nat. Bank, 27 Fed. Rep. 591; Price v. Whitney, (1886) 28 Fed. Rep. 297; Magruder v. Colston, (1875) 44 Md. 349, 356; Fisher v. Seligman, (1881) 75 Mo. 13; Adderley v. Storm, 6 Hill, 624; Crease v. Babcock, 10 Met. 525; *In re* Empire City Bank, 18 N. Y. 200, 224; Holyoke Bank v. Burnham, 11 Cush. 183, 187.

² Mokelumne Hill Canal Co. v. Woodbury, 14 Cal. 265; Davidson v. Rankin, 34 Cal. 503; Larrabee v. Baldwin, 35 Cal. 155; Williams v. Hanna, (1872) 40 Ind. 535; Brown v. Hitchcock, (1881) 36 Ohio St. 667; Wheeler v. Faurot, (1881) 37 Ohio, 26; Milliken v. Whitehouse, 49 Me. 527; Moss v. Oakley, 2 Hill, 265; Judson v. Rossie-Galena Co., 9 Paige,

598; McCullough v. Moss, 5 Denio, 567; Tracy v. Yates, 18 Barb. 152; Adderly v. Storm, 6 Hill, 624; Free-land v. McCullough, 1 Denio, 414; Harger v. McCullough, 2 Denio, 119, Byers v. Franklin Coal Co., (1870) 106 Mass. 131. *Cf.* Castleman v. Holmes, (1829) 4 J. J. Marsh. 1; Mill Dam Foundry v. Hovey, (1839) 21 Pick. 417; Holyoke Bank v. Burnham, (1853) 11 Cush. 183; Garrison v. Howe, (1858) 17 N. Y. 458, 464. Bronson, J., in explanation of this rule, said in *Moss v. Oakley*, 2 Hill, 265: "A man who purchases stock and comes into a corporation after it has been engaged in business, may often be deceived in relation to the number and magnitude of its debts. But while he is a stockholder he can know something about the extent of obligations contracted by the company, and is not wholly without the means of exerting an influence over those who manage its concerns."

³ Johnson v. Underhill, (1873) 52 N. Y. 203; Middletown Bank v. Maggill, 5 Conn. 28; Johnson v. Laffin,

of cases it is held that where the statute provides that "all members," or "all stockholders" shall be individually liable, the term includes not only those who were such when the debt is contracted but also those claiming to be stockholders at the time the action upon the debt is commenced.¹ A stockholder is not liable for debts contracted before he became a member if he ceases to be a member before the debt becomes due and action is brought for its collection.² So when stockholders are liable for debts of the corporation for which promissory notes were issued, they are discharged by the cancellation of

(1878) 5 Dill. 65; *Moss v. Oakley*, (1842) 2 Hill, 265; *Cowles v. Cromwell*, (1857) 25 Barb. 413; *Cole v. Ryan*, (1868) 52 Barb. 168; *Chouteau Spring Co. v. Harris*, (1855) 20 Mo. 382; *McClaren v. Franciscus*, (1869) 43 Mo. 452; *Miller v. Great Republic Ins. Co.*, 50 Mo. 55; *Grissell v. Bristowe*, L. R. 3 C. P. 112; *Huddersfield Coal Co. v. Buckley*, 7 Term Rep. 36; *Croxton's Case*, 1 De G., M. & G. 600; *Mayhew's Case*, 5 De G., M. & G. 837; *Sutton's Case*, 3 De G. & Sm. 262; *Nixon v. Green*, 11 Ex. 550; s. c. 25 L. J. Ex. 209. *Cf.* *Williams v. Hanna*, (1872) 40 Ind. 535; *Hager v. Cleveland*, (1872) 36 Md. 476; *Holyoke Bank v. Burnham*, (1853) 11 Cush. 183; *Bond v. Appleton*, 8 Mass. 472; *Marcy v. Clark*, 17 Mass. 330; *Curtis v. Harlow*, 12 Met. 3.

¹ *Curtis v. Harlow*, 12 Met. 3; *Wheeler v. Faurot*, (1881) 27 Ohio St. 26; *Brown v. Hitchcock*, (1881) 36 Ohio St. 667. *Cf.* *Jackson v. Sligo Manuf. Co.*, (1878) 1 Lea, 210. "No stockholder shall be personally liable for any debt of the corporation not payable within two years from the time it is contracted, nor unless an action for its collection shall be brought against the corporation within two years after the debt becomes due; and no action shall be brought against a stockholder after

he shall have ceased to be a stockholder in any such company, for any debt of the corporation, unless brought within two years from the time he shall have ceased to be a stockholder." N. Y. Laws 1890, ch. 564, § 58; *Handy v. Draper*, (1882) 89 N. Y. 334; *Hastings v. Drew*, 76 N. Y. 9; *Shellington v. Howland*, 53 N. Y. 371; *Freeland v. McCullough*, 1 Denio, 414, 426; *Veiler v. Brown*, 18 Hun, 571; *Fisher v. Marvin*, (1866) 47 Barb. 159. "The liability extends to all persons who were stockholders when the debt sought to be enforced was contracted, and also to all persons who were stockholders when the liability is sought to be enforced, although they may have become such since the debt was contracted, but it does not extend to persons who had become stockholders, after the debt was contracted, and had ceased to be such before the debt became payable and action was brought." *Sayles v. Bates*, (1886) 15 R. I. 342; *In re South Mountain &c. Mining Co.*, (1881) 7 Sawyer, 30; *Laing v. Burley*, (1882) 101 Ill. 591; *Brown v. Hitchcock*, (1881) 36 Ohio St. 667; *Cleveland v. Burnham*, 55 Wis. 598.

² *Holyoke Bank v. Burnham*, 11 Cush. 183; *Sayles v. Bates*, 15 R. I. 342; *Prince v. Lynch*, 38 Cal. 523; s. c. 99 Am. Dec. 434, and note.

the notes and the issue of new notes in payment of the debt after they ceased to be stockholders.¹ These three classes of statutes and the decisions construing them thus respectively, in effect, favor the subsequent transferee, the persons who are stockholders at the time the debt was contracted, and the creditor.

§ 709. (e) Purchasers at sales of forfeited stock.— If the stock has been only partially paid for, the purchaser at a forfeiture sale must pay the installments due and to become due, and if he fails to do so the shares must be sold again.² A sale of stock pursuant to the authority contained in a pledge is not open to the charge that it was done in fraud of creditors, even though the object of the pledgees was to avoid the liability imposed by the national banking act.³

§ 710. Proceedings against members of voluntary associations.— The creditors of a voluntary association may proceed either against the association or its members.⁴ In New York, however, before the individual members of an unincorporated association, consisting of more than seven members, and having by-laws and a treasurer, can be sued for a debt of the association, an action must first be brought against the president or treasurer.⁵ If the persons constituting an association send an agent into the market with unlimited authority to make purchases and contract debts in the name and for the benefit of the association and not in the names of the in-

¹ *Wheeler v. Faurot*, 37 Ohio St. 26.

² *Sturges v. Stetson*, 1 Biss. 246, 251; "Contributories on Forfeited Shares," 43 L. T. 97. In England, however, it is enacted that the purchaser at a forfeiture sale holds the shares discharged of all calls due prior to purchase. He is not bound to see to the application of the purchase money, nor is his title to be affected by any irregularity in the proceedings in reference to the sale. 8 Vic. ch. 16, § 33.

³ *Magruder v. Colston*, 44 Md. 349.

⁴ *Davison v. Holden*, (1887) 55

Conn. 103; s. c. 3 Am. St. Rep. 40, holding also that persons permitted under the Connecticut Act of 1875, to form voluntary associations for trading purposes, do not acquire corporate rights or immunity from individual liability; "Clubs and the Outside World," (1882) 17 L. J. 136; "Liabilities of Members of Clubs," 13 Leg. Obs. 481; "Partnership and Joint-stock Companies," 11 Jour. Jur. 233, 289.

⁵ *Flagg v. Swift*, 25 Hun, 623; N. Y. Code, § 1919.

dividuals composing it, the creditor may, if he is content to look only to the property of the association as such for his security, institute his action against the association by its distinguishing name.¹ If he desires to reach the individual property of members, he must institute his suit against such and so many of them as he can name, as individuals. He may do this even if the sale was made and the credit given in form to the association, and the name of no individual member was then known to him, for the reason that he gave credit upon the request of a known agent for an unknown principal. By operation of law the credit was to the principal from the beginning, to be enforced whenever he can be discovered.² A suit may be instituted by the creditor against the individuals composing a voluntary association, as at common law, if the plaintiff will take the risk of naming all and naming them correctly.³ If he names only a part of those who should be named, a plea in abatement may be interposed specifying omitted names.⁴ But if no such plea be interposed, those who are named are properly sued and must submit to judgment.⁵

§ 711. Remedies at law and in equity.—It has been held that, where stockholders are in default after calls regularly made, a judgment creditor of the corporation has a complete remedy at law, and therefore will not, in the absence of some special circumstance, be allowed to proceed in equity.⁶ So in the case of a bank whose stockholders are subject to a personal liability for losses. "As to the trust funds and saving funds deposited," individual creditors seeking to enforce this liability at law may be enjoined from prosecuting such suits at the instance of the whole body of creditors interested.⁷

¹ Davison v. Holden, (1887) 55 Conn. 103; s. c. 3 Am. St. Rep. 40. Cf. "Liabilities of Partners of Joint-stock Companies," 1 Scot. L. J. 78, 117, and 2 Scot. L. J. 1.

² Davison v. Holden, (1887) 55 Conn. 103; s. c. 3 Am. St. Rep. 40. Cf. Monographic Note, 7 Am. St. Rep. 162.

³ Davison v. Holden, (1887) 55 Conn. 103; s. c. 3 Am. St. Rep. 40.

⁴ Davison v. Holden, (1887) 55 Conn. 103; s. c. 3 Am. St. Rep. 40.

⁵ Davison v. Holden, (1887) 55 Conn. 103; s. c. 3 Am. St. Rep. 40.

⁶ Allen v. Montgomery R. Co., 11 Ala. 437. Cf. "Proceedings by *Scire Facias* against Members of Corporations," 38 Lég. Obs. 117; "*Scire Facias* against Railway Shareholders," 12 Sol. J. & Rep. 92, 111.

⁷ Eames v. Doris, 102 Ill. 350.

Where the liability of stockholders is several, an action at law cannot be maintained, unless expressly provided by statute, to enforce the statutory liability of the stockholders, in which they are all joined, but each creditor has his remedy against each stockholder.¹ Under the Manufacturing Company's Act of Illinois, the creditor's remedy is held to be clearly in equity,² though there was some doubt as to whether the bill in equity would lie; yet in case the corporation is insolvent, and the corporate creditors numerous, a bill in equity is the proper remedy.³ In Minnesota an action to enforce the individual liability of a stockholder in a manufacturing corporation, in a case not falling within the provisions of the general statutes of that State relating to fraud, etc., must be in the nature of a suit in equity, prosecuted by, or in behalf of, all creditors, and against the corporation and all the stockholders upon whom the liability rests.⁴ Two or more creditors may join in an equitable action to enforce the statutory liability of shareholders.⁵ Where, as by the laws of Ohio, the stockholders of a corporation organized thereunder are individually liable to the amount of their stock, this liability is collateral, to be resorted to by creditors only in case of the insolvency of the corporation, or when payment can not be enforced against it by the ordinary process.⁶ A joint action may be brought to recover from stockholders of an insolvent corporation the amount of a debt due from the corporation, and the judgment may be so framed as to apportion their liability;⁷ but in a suit by a creditor to enforce a stockholder's individual liability for a corporate debt, it is not necessary to join all the creditors of the corporation, nor all the stockholders.⁸ A bill having been brought originally by one who, with the assistance of others, buys up the whole of the company's indebtedness, and has it assigned to himself in trust for himself and

¹ *Abbott v. Aspinwall*, 26 Barb. 202; *Morrow v. Superior Court*, 64 Cal. 383.

² *Rounds v. McCormick*, 114 Ill. 252; *Harper v. Union Manuf. Co.*, 110 Ill. 222; *Low v. Buchanan*, 94 Ill. 76.

³ *Tunesma v. Schuttler*, (1885) 114 Ill. 156.

⁴ *Johnson v. Fischer*, 30 Minn. 173, construing Minn. Gen. Stat. ch. 34, § 9.

⁵ *Hickling v. Wilson*, (1882) 104 Ill. 54.

⁶ *Minick v. Mingo Iron Works Co.*, 25 W. Va. 184.

⁷ *Overmyer v. Cannon*, 82 Ind. 457.

⁸ *Brundage v. Monumental Gold & Mining Co.*, 12 Oregon, 322.

the others, an amendment joining the other purchasers as complainants was held to be allowable.¹

§ 712. Bills in equity.—As a corollary to the trust-fund doctrine, it follows that when the legal assets of a corporation are insufficient to meet the demands of its creditors, they may invoke the aid of a court of equity to compel the payment of the balance due upon subscriptions to the capital stock² by a bill making the corporation and all the solvent stockholders, known to the plaintiff, within the jurisdiction of the court, defendants,³ (except where this will be excused upon an alle-

¹Aultman's Appeal, 98 Pa. St. 505.

²"Petition in Bankruptcy against Officers and Stockholders," 11 Alb. L. J. 155; *Chandler v. Siddle*, 10 Bankr. Reg. 236; *Myers v. Seeley*, 10 Bankr. Reg. 411; *Ogilvie v. Knox Ins. Co.*, (1859) 22 How. 380; *Salman v. Hamborough Co.*, 1 Cas. in Ch. (Eng.) 204; *Henry v. Vermilion & Co.*, *Turnpike Co.*, (1848) 17 Ohio, 187; *Miers v. Zanesville & Co.*, *Turnpike Co.*, (1842) 11 Ohio, 273; *Bank of Cincinnati*, 8 Ohio, 62, 71; *Judson v. Rossie Galena Co.*, (1842) 9 Paige, 598; *Van Pelt v. United States & Co.*, (1872) 13 Abb. Prac. (N. S.) 331; *Hammond v. Hudson River & Co.*, (1854) 11 How. Pr. 33; *Louisiana Paper Co. v. Waples*, (1877) 3 Woods, 34; *Faull v. Alaska Mining & Co.*, (1883) 8 Sawyer, 420; *Stephens v. Fox*, (1881) 83 N. Y. 313; *Dayton v. Rorst*, (1865) 31 N. Y. 435; *Gillet v. Moody*, 5 Barb. 179; s. c. 3 N. Y. 479; *Bank of the United States v. Dallam*, (1836) 4 Dana, 574; *Bank of Virginia v. Adams*, 1 Pars. Sel. Cas. 534; *Crawford v. Rohrer*, (1882) 59 Md. 599; *Stinson v. Williams*, 35 Ga. 170; *Adler v. Milwaukee & Co.*, (1860) 13 Wis. 57; *Curry v. Woodward*, (1875) 53 Ala. 371; *Glenn v. Semple*, 80 Ala. 159; s. c. 60 Am. Rep. 92, 94; *Wincock v. Turpin*, (1880) 96 Ill. 135; *Bassett v. St. Alban's Hotel Co.*,

47 Vt. 313; *Ward v. Griswoldville Manuf. Co.*, (1844) 16 Conn. 593; *Lane's Appeal*, 105 Pa. St. 49; and cases cited in the next note. A case for equitable relief is made out by a creditor's bill against the shareholders of a corporation, which alleges that the corporation is insolvent, that the shareholders are subject to personal liability, and that the assets are being wasted by the institution of separate suits at law by many creditors. *Tunesma v. Schuttler*, 114 Ill. 156.

³*Morgan v. New York & Co. R. Co.*, 10 Paige, 290; s. c. 40 Am. Dec. 244; *Coleman v. White*, 14 Wis. 700; s. c. 80 Am. Dec. 797; *Ericson v. Nesmith*, 46 N. H. 371; s. c. 77 Am. Dec. 78; *Hightower v. Thornton*, 8 Ga. 486; s. c. 52 Am. Dec. 412; "Remedy in Equity of Creditor against Shareholders of Foreign Corporation," by Gideon D. Bantz, 21 Cent. L. J. 90; *Germantown & Co. Ry. Co. v. Fitler*, 60 Pa. St. 124; s. c. 100 Am. Dec. 546; *Wincock v. Turpin*, 96 Ill. 135; *Harmon v. Page*, (1882) 62 Cal. 448; *Sherwood v. Buffalo & Co. R. Co.*, (1855) 12 How. Pr. 137; *Hatch v. Dana*, (1879) 101 U. S. 205; *Sanger v. Upton*, 91 U. S. 56, 60; *Marsh v. Burroughs*, (1871) 1 Woods, 463; *Holmes v. Sherwood*, (1881) 16 Fed. Rep. 725; *Stevens v. Fox*, (1891) 83 N. Y. 313; s. c. 17 Hun, 435;

gation that the number is too great,)¹ and so framed as to admit as plaintiffs all other creditors who may wish to come in.² If the other creditors do not elect to join, it is immaterial, for although proper parties to the suit they are not necessary parties.³ When one such bill has been filed, the court will not allow other creditors to file similar bills, but will require them all to join in one proceeding.⁴

§ 713. **Mandamus to compel calls.**—*Mandamus* by creditors of corporations to compel the officers to make calls for the purpose of raising funds to meet their demands is a remedy to which a resort does not appear to have been attempted in this country; and the use of the writ for this purpose has been doubted.⁵ But in England a *mandamus* is sometimes

Pfohl v. Simpson, (1878) 74 N. Y. 137; Griffith v. Mangam, 73 N. Y. 611; Mathez v. Neidig, 72 N. Y. 100; Crease v. Babcock, 10 Met. 525; Wetherbee v. Baker, 35 N. J. Eq. 501; Umsted v. Buskirk, 17 Ohio St. 113; Carpenter v. Marine Bank, 14 Wis. 705; Mann v. Pentz, 3 N. Y. 415; Masters v. Rossie &c. Mining Co., 2 Sandf. Ch. 301; Walsh v. Memphis &c. R. Co., 2 McCrary, 156; Vick v. Lane, 56 Miss. 681; Hadley v. Russell, 40 N. H. 109; Pierce v. Milwaukee &c. Co., 38 Wis. 250; Dalton &c. R. Co. v. McDaniel, (1876) 56 Ga. 191; Hightower v. Thornton, 8 Ga. 506; Curry v. Woodward, 33 Ala. 371; Allen v. Montgomery &c. R. Co., (1847) 11 Ala. 437; Crawford v. Rohrer, 59 Md. 599; Perry v. Little, 101 U. S. 216; Wilbur v. Stockholders, 18 Bankr. Reg. 178; Pollard v. Bailey, 20 Wall. 520; Smith v. Huckabee, 53 Ala. 191; Jones v. Jarman, 34 Ark. 323; Harris v. First Parish in Dorchester, 23 Pick. 112; Knowlton v. Ackley, 8 Cush. 93; Spear v. Grant, 16 Mass. 9; Hodges v. Silver Hill Mining Co., 9 Oregon, 200.

41 Ohio St. 78. A bill will not be held defective merely because it fails to make all the delinquent stockholders parties defendant. Hatch v. Dana, 10 U. S. 205; Ogilvie v. Knox Ins. Co., 22 How. 380; Marsh v. Burroughs, 1 Woods, 463; Holmes v. Sherwood, 3 McCrary, 405; Griffith v. Mangam, 73 N. Y. 611; Bartlett v. Drew, 37 N. Y. 587; Glenn v. Williams, 60 Md. 93; Brundage v. Monumental &c. Mining Co., 12 Oregon, 322. Cf. Von Schmidt v. Huntington, 1 Cal. 55; Lamar Ins. Co. v. Gulick, 102 Ill. 41.

² Patterson v. Lynde, 106 U. S. 519; Terry v. Lyttle, 101 U. S. 216; Brown v. Fiske, 23 Fed. Rep. 228; Holmes v. Sherwood, 3 McCrary, 405; Pollard v. Bailey, 20 Wall. 520; Sawyer v. Hoag, 17 Wall. 610.

³ Hatch v. Dana, 101 U. S. 205; Marsh v. Burroughs, 1 Woods, 463; Crease v. Babcock, 10 Met. 525. Cf. Adler v. Milwaukee &c. Co., 13 Wis. 57.

⁴ Crease v. Babcock, 10 Met. 525. But see Perry v. Turner, 55 Mo. 418.

⁵ Hays v. Lycoming F. Ins. Co., 98 Pa. St. 184; Hatch v. Dana, (1879) 101 U. S. 205; Dalton &c. R. Co. v. McDaniel, 56 Ga. 191. Cf. Cucullu

¹ Vick v. Lane, 56 Miss. 681, 684. Cf. Bonewitz v. Van Wert Co. Bank,

granted.¹ Creditors need not, however, apply for a *mandamus*, but may compel the payment of unpaid subscriptions by suit in equity.²

§ 714. **Calls by courts of equity.**—Where stock is subscribed to be paid upon the call of the company, and the company becomes insolvent and refuses or neglects to make the call, a court of equity will assume the function if the interests of the creditors require it.³ In England the courts have at the instance of corporate creditors compelled the directors of a corporation to issue a call for unpaid subscriptions by *mandamus*,⁴ a doubtful remedy in the United States.⁵ Although a call is generally necessary to fasten the obligation absolutely upon the stockholders, yet in case of corporate insolvency, no call is necessary. It is sufficient that a court of equity orders the subscriptions to be paid.⁶ A decree of a court of equity

v. Union Ins. Co., (1842) 2 Rob. (La.) 573; *Allen v. Montgomery &c. R. Co.*, (1847) 11 Ala. 437.

¹ *Queen v. Victoria Park Co.*, 1 Q. B. 288; *Queen v. Ledyard*, 1 Q. B. 616; *King v. St. Catharine Dock Co.*, 4 Barn. & Adol. 360.

² *Ward v. Griswoldville Manuf. Co.*, 16 Conn. 593, 601; *Dalton &c. R. Co. v. McDaniel*, 55 Ga. 191. A foreign insolvent corporation, if still in existence, could be compelled by *mandamus*, or by bill in equity, to collect the unpaid subscriptions from its stockholders. If it had ceased to exist, a receiver should be appointed, who would represent the corporation. *Patterson v. Lynde*, 112 Ill. 196, 206.

³ *Scoville v. Thayer*, 105 U. S. 143; *Robinson v. Bank*, 18 Ga. 65; *Curry v. Woodward*, 53 Ala. 371; *Ward v. Griswoldville Manuf. Co.*, 16 Conn. 593, 601. Where shareholders are liable to the corporate creditors as a class, the legal remedy is inadequate and the aid of equity must be invoked. *Rounds v. McCormick*, 114 Ill. 252.

⁴ *Queen v. Victoria Park Co.*, 1 Ad.

& E. N. S. 544; *Queen v. Ledyard*, 1 Ad. & E. N. S. 616; *King v. Katherine Dock Co.*, 4 Barn. & Ad., 360.

⁵ *Hatch v. Dana*, 101 U. S. 205; *Dalton &c. R. Co. v. McDaniel*, 56 Ga. 191. *Cf. Cucullu v. Union Ins. Co.*, 2 Rob. (La.) 573; *Allen v. Montgomery &c. R. Co.*, 11 Ala. 437.

⁶ *Sanger v. Upton*, 91 U. S. 56; *Marsh v. Burroughs*, 1 Woods, 463; *Sagory v. Dubois*, 3 Sandf. Ch. 466; *Glenn v. Williams*, 60 Md. 93; *Scovill v. Thayer*, 105 U. S. 143, 155; *Hatch v. Dana*, 101 U. S. 205, 214; *Chubb v. Upton*, 95 U. S. 665; *Wilbur v. Stockholders*, 18 Bankr. Reg. 178; *Myers v. Seeley*, 10 Bankr. Reg. 411; *Curry v. Woodward*, 53 Ala. 371; *Glenn v. Semple*, 80 Ala. 150; s. c. 60 Am. Rep. 92; *Robinson v. Bank of Darien*, 18 Ga. 65; *Ward v. Griswoldville Manuf. Co.*, 16 Conn. 593; *Henny v. Vermillion &c. R. Co.*, 17 Ohio, 187. *Cf. Germantown &c. R. Co. v. Fitley*, 60 Penn. St. 124; *Chandler v. Keith*, 42 Iowa, 99; *Mann v. Pentz*, 3 N. Y. 415; *Ogilvie v. Knox Ins. Co.*, 22 How. 380; *Adler v. Milwaukee Manuf. Co.*, 13 Wis. 62,

making an assessment upon the capital stock of a corporation for the payment of corporate debts is binding upon all stockholders whether or not they were individually parties to the action.¹ A call by trustees or directors is only a step in the process of the collection of unpaid subscriptions, and therefore a court of equity may pursue its own method of collection provided no injustice is done the stockholders.² The dissolution of a corporation does not destroy the right of creditors to enforce the unpaid subscriptions to the stock, and they may reach this fund through the courts of equity.³ Although it is a rule of the common law that debts due to and from a corporation are extinguished by its dissolution, yet when the legislature has interposed to prevent that result, the courts must sustain the legislative enactments.⁴ Where an assignment for the benefit of its creditors has been made by a corporation, it is competent for the court in chambers during vacation to authorize by order the collection of all the unpaid balance due on stock.⁵

§ 715. Whether unsecured creditors may procure appointment of a receiver.— When ordinary remedies, either at law or in equity, are sufficient to enable unsecured creditors to enforce the payment of their claims, they can not, even though they have obtained judgment against the company, ordinarily procure the appointment of a receiver merely on the ground that it fails or refuses to satisfy their claims,⁶ unless they can show that the company is insolvent and that there is danger of its wasting its assets.⁷ But an application for the appoint-

And see *Seymon v. Sturgess*, 26 N. Y. 134; *Wheeler v. Millar*, 90 N. Y. 353; *Briggs v. Penniman*, 8 Cow. 387, 395; s. c. 18 Am. Dec. 454; *Salmon v. Hamborough Co.*, 1 Cas. Ch. 204.

¹ *Glenn v. Williams*, 60 Md. 93.

² *Crawford v. Rohrer*, (1882) 59 Md. 599.

³ *Hightower v. Thornton*, (1850) 8 Ga. 486; s. c. 52 Am. Dec. 412; *Tarbell v. Page*, 24 Ill. 46.

⁴ *Robinson v. Lane*, (1856) 19 Ga. 337; *Thornton v. Lane*, 11 Ga. 459; *Lane v. Morris*, (1850) 8 Ga. 468, 476.

⁵ *Citizens' &c. Trust Co. v. Gillespie*, (1887) 115 Pa. St. 564.

⁶ *Beach on Railways*, § 696; *Sage v. Memphis &c. R. Co.*, 125 U. S. 361; *Milwaukee & M. R. Co. v. Soutter*, 2 Wall. 510, 523.

⁷ *Turnbull v. Prentiss Lumber Co.*, 55 Mich. 387; *Powers v. Hamilton Paper Co.*, 60 Wis. 23. Cf. *Kelley v. Alabama &c. R. Co.*, 58 Ala. 489. But it is not necessary in such a case that they should first sue out an execution, where he deems it useless and no objection is made to the ap-

ment of a receiver of a corporation will not be granted on a mere allegation of insolvency and suspension of business for want of funds, it not being shown what facts and circumstances would constitute the insolvency.¹ While the appointment of receivers does not follow as a matter of course upon a decree declaring a corporation insolvent, but rests in the discretion of the chancellor, yet, generally, receivers will be appointed, unless it be shown to be for the interest of the creditors and stockholders to leave the directors in charge of the affairs.²

§ 716. Powers of receivers and assignees.—When the corporate assets are in the hands of a receiver, corporate creditors can not of course maintain any action to appropriate the corporate property. But the statutory liability is not a corporate asset, and corporate creditors may, without reference to the receiver, prosecute their action freely, to recover from the shareholders upon that ground.³ So a receiver of a corporation organized under the general manufacturing act is not vested with the right of action given by that act to creditors of the corporation to enforce their liabilities against the stockholders. This right is conferred only upon such creditors as are within the prescribed conditions, and for their personal benefit;⁴ and in Illinois a receiver of “all the estate, property, and equitable interest” of an insolvent banking corporation created by that State can not enforce against a stockholder in the corporation the liability imposed by the statute of Illinois on each shareholder for double the amount of his stock, such liability being one in favor of creditors of the bank, and

plication for a receiver on the ground of his failure so to do. *Sage v. Memphis &c. R. Co.*, 125 U. S. 361, per Harlan, J.

¹ *Newfoundland R. Construction Co. v. Schack*, 40 N. J. Eq. 222; *Beach on Railways*, § 702.

² So where it appeared that the insolvency of a corporation had been long known to the directors, and that with such knowledge sales of its property had been made to them, to pay antecedent debts due to them,

a receiver was appointed to investigate the legality of these sales, although the corporation appeared to have no property. *Nichols v. Perry &c. Co.*, 11 N. J. Eq. 126; *Mercantile Trust Co. v. Missouri &c. Ry. Co.*, 36 Fed. Rep. 221; *Beach on Receivers*, § 347.

³ *Mason v. New York Silk Manuf. Co.*, 27 Hun, 307; *Jacobson v. Allen*, 12 Fed. Rep. 454.

⁴ *Farnsworth v. Wood*, 91 N. Y. 308.

not in favor of the corporation.¹ Nor is any personal liability imposed on the stockholders of an insolvent trust company in a receiver's hands by a charter provision that if at any time the capital stock paid into said corporation shall be impaired by losses or otherwise, the directors shall forthwith repair the same by assessment."² Where the deed of trust of an insolvent corporation provides that the unpaid subscriptions shall be payable to the trustee, the right to collect them passes thereby, and they may be enforced in a suit for that purpose, brought by a creditor.³ And a trust deed for the benefit of creditors, including "all the estate, property, rights, and credits" of the grantor, "of every kind and wherever situated," and "all moneys payable to the company, whether on calls or assessments on stock of the company or otherwise," passes the title to the unpaid subscriptions to the capital stock to said trustees, with power to collect and receive the same, when authoritatively called for, to the extent of the call made.⁴ When unpaid subscriptions of stock, not called in, are assigned, in a general assignment for the benefit of creditors, a bill in equity by the assignee will be entertained, on behalf of all the creditors, to recover unpaid subscriptions.⁵ But mere insolvency is never sufficient evidence of the surrender of corporate rights.⁶ It has been said that the filing of a creditor's bill in equity against a corporation is equivalent to a call for unpaid subscriptions;⁷ and that since an assignee in bankruptcy succeeds to all the rights of the insolvent corporation, he has authority to make and to enforce payment of calls.⁸ But in an action by a receiver it is said that the only condition upon which a sub-

¹ *Jacobson v. Allen*, 20 Blatchf. C. Ct. 525.

² *Dewey v. St. Alban's Trust Co.*, (1885) 57 Vt. 332.

³ *Hamilton v. Glenn*, (1889) 85 Va. 901, also holding that whether the right to collect the subscriptions passes by the deed of trust or not, the right of the corporation to them passes to creditors under Va. Code, ch. 57, § 23, which requires stockholders to pay their subscriptions upon call by the president and directors, and provides that they may

be recovered by action, warrant, or motion.

⁴ *Lewis v. Glenn*, (1888) 84 Va. 947.

⁵ *Lionberger v. Broadway Savings Bank*, (1882) 10 Mo. App. 499; "Rights of Receivers to Sue Stockholders for Unpaid Subscriptions," 29 Alb. L. J. 365.

⁶ *Hall v. Lackmond*, (1887) 50 Ark. 113; s. c. 6 Am. St. Rep. 84.

⁷ *Hatch v. Dana*, 101 U. S. 205.

⁸ *Hatch v. Dana*, 101 U. S. 205. A stockholder may, of course, pay his subscription although no call has

scriber can be made liable to the corporation is by regular calls made in pursuance of the charter.¹ An assignment for the benefit of creditors may be made by the directors of a corporation without the ratification of the stockholders, so as to confer, under a statutory provision making stockholders liable to creditors to the extent of their unpaid stock, on the assignee the right, by suit in equity, to compel payment from delinquent stockholders.²

§ 717. **The same subject continued.**— It has been held in New York, under the General Manufacturing Act of that State, that a receiver of an insolvent corporation has no rights against stockholders upon their personal liability as prescribed by the act, for the liability does not exist in favor of the corporation, nor of all the creditors, but only in favor of such creditors as are in a certain position.³ But under special statutes in New York, trustees are vested with power to collect these claims on behalf of creditors.⁴ A receiver has no greater rights with respect to calls upon delinquent stockholders than has the corporation; and where a stockholder has ceased to be a member of the corporation so that it can not make calls on the stock previously held by him, the receiver

been made. *Marsh v. Burroughs*, 1 Wood, 463; *Poole's Case*, 9 Ch. Div. 322. And by the English Companies Act of 1845, authority is conferred upon the company to allow to the subscriber interest on a payment of his subscription or any part thereof beyond the sums actually called for. The Companies Clauses Act, 1845, 8 Vict. ch. 16, § 24. When the corporation is insolvent, money voluntarily paid by the directors upon their subscriptions, no call having been made, and immediately repaid them for fees, may be recovered by the corporate creditors. *Syke's Case*, L. R. 13 Eq. Cas. 255. A debt due a subscriber from a solvent corporation may be set off against the amount owing upon his subscription, and payment be thus effected although no call has been made. *Adamson's Case*, L. R.

18 Eq. Cas. 670. But if the corporation be insolvent, he must pay for his shares and come in with other creditors for a *pro rata* payment of his claims.

¹ *Mann v. Pentz*, 3 N. Y. 415; *Seymour v. Sturgess*, 26 N. Y. 134.

² *Chamberlain v. Bromberg*, (1888) 83 Ala. 576.

³ *Farnsworth v. Wood*, (1883) 91 N. Y. 308; *Pfohl v. Simpson*, 74 N. Y. 137; *Weeks v. Love*, 50 N. Y. 568; *Mason v. New York Silk &c. Co.*, (1882) 27 Hun, 307; *Billings v. Trask*, (1883) 30 Hun, 314.

⁴ *Cuykendall v. Corning*, (1882) 88 N. Y. 129; *Story v. Furman*, 25 N. Y. 215; *Walker v. Crain*, 17 Barb. 128; *Herkimer Co. Bank v. Furman*, 17 Barb. 116; *Hurd v. Tallman*, 60 Barb. 272.

is in no better position.¹ The creditors have the right to the exclusive control of the fund created for their benefit — may assign it *inter vivos*, or transmit it to their personal representatives.² So the receiver or assignee in bankruptcy of a foreign corporation may maintain an action against a resident stockholder if the corporation could have done so had the stockholder been a resident of the State in which the corporation is domiciled.³ But to enable a receiver to sue at law for unpaid subscriptions, a call by the corporation or some competent court is first necessary.⁴ And where a receiver has been appointed, a suit to compel the payment of subscriptions should be prosecuted in his name.⁵

§ 718. Remedy when a receiver has been appointed in prior proceedings.—When a receiver has possession of the corporate property, unsecured creditors seeking to reach it must apply to the court appointing him for leave to sue its

¹ *Billings v. Robinson*, (1884) 94 N. Y. 415; *Farnsworth v. Wood*, (1883) 91 N. Y. 308; *Cutting v. Damerel*, 88 N. Y. 410; *Cuykendall v. Corning*, 88 N. Y. 129; *Arenz v. Weir*, 89 Ill. 25; *Jacobson v. Allen*, 20 Blatchf. 525; *Hanson v. Donkersley*, 37 Mich. 184.

² *Pfohl v. Simpson*, 74 N. Y. 137; *Weeks v. Love*, 50 N. Y. 563; *Zabriskie v. Smith*, 13 N. Y. 322; *Wade v. Kalbfleish*, 58 N. Y. 282; *Jackson v. Daggett*, (1881) 24 Hun, 204.

³ *Dayton v. Borst*, 31 N. Y. 435; *Nathan v. Whitlock*, 9 Paige, 152; *Chandler v. Brown*, 77 Ill. 333; *Frank v. Morrison*, (1892) 58 Md. 423. *Cf. Tinkham v. Borst*, (1860) 31 Barb. 407; *McDonough v. Phelps*, (1856) 15 How. Prac. 372; *Seymour v. Sturgess*, (1862) 26 N. Y. 134.

⁴ *Nathan v. Whitlock*, 9 Paige, 152; *Chandler v. Keith*, (1875) 42 Iowa, 99; *Mills v. Scott*, 99 U. S. 25; *Cleveland v. Burnham*, (1885) 55 Wis. 598.

⁵ *Rankine v. Elliott*, 16 N. Y. 377; *Dane v. Young*, 61 Me. 160; *Hall v.*

United States Ins. Co., 5 Gill, (Md.) 434; *Hightower v. Thornton*, 8 Ga. 486; *In re Birmingham &c. Ry. Co.*, (1881) 18 Ch. Div. 155. See also on this subject generally, *Trustees of Louisiana Paper Co. v. Waples*, 3 Woods, 34; *Burlington &c. R. Co. v. Boestler*, 15 Iowa, 555; *Penobscot &c. R. Co. v. Dunn*, 39 Me. 587; *Philadelphia &c. R. Co. v. Hickmah*, (1857) 28 Pa. St. 318; *Carlisle v. Cahawba &c. R. Co.*, (1842) 4 Ala. 70; *Coleman v. White*, 14 Wis. 700; *Umsted v. Buskirk*, 17 Ohio St. 113; *Mann v. Pentz*, 3 N. Y. 415; *Hall v. United States Ins. Co.*, 5 Gill, (Md.) 484; *Freeman v. Winchester*, 18 Miss. 577; *Pentz v. Hawley*, 1 Barb. Ch. 122; *Sagory v. DuBois*, 3 Sandf. Ch. 466; *Gas Light & B. Co. v. Haynes*, 7 La. Ann. 114; *New Orleans Gas Light Co. v. Bennett*, 6 La. Ann. 457; *Starke v. Burke*, 9 La. Ann. 341; *Atwood v. Rhode Island Agric. Bank*, 1 R. I. 376; *Eppricht v. Nickerson*, (1884) 78 Mo. 482; *Shockley v. Fisher*, (1882) 75 Mo. 498; *German-town &c. Ry. Co. v. Fitler*, (1869) 60

receiver.¹ Although there may be a superior title, and that plainly appearing, the court must first be applied to for leave to sue.² For to bring suit and to seek to reach the property in a receiver's hands without leave of the court appointing him, is considered to be a contempt of court, as an interference with the possession of its officer.³ It rests in the discretion of the court to allow a party claiming rights against its receiver to bring an independent action against him or to compel the party to proceed against him by petition in the action in which he is receiver.⁴ It is usual, however, to grant permission to sue receivers, unless it appears clearly from the application of the claimant that his demand has no legal foundation.⁵ For, as has been aptly said, receivers are not appointed "for the purpose of keeping persons out of their rights."⁶ But a court

Pa. St. 124; *Wright v. McCormack*, 17 Ohio St. 86, 95; *Dutcher v. Marine National Bank*, 12 Blatchf. 435.

¹ *Barton v. Barbour*, 104 U. S. 126; *Davis v. Gray*, 16 Wall. 203; *Reed v. Receivers of Richmond &c. R. Co.*, (1888) 84 Va. 231.

² *Moore v. Mercer &c. Co.*, (N. J. 1888) 4 Ry. & Corp. L. J. 563, citing *Noe v. Gibson*, 7 Paige, 513; *Angel v. Smith*, 9 Ves. 335; *Brooks v. Greathed*, 1 Jac. & W. 176; *Beach on Receivers*, §§ 213, 224, 225; 2 *Daniell Chancery Pr.* 1743, 1744.

³ *Thompson v. Scott*, 4 Dill. 503; *Kennedy v. Indianapolis, C. & L. R. Co.*, 3 Fed. Rep. 97; *Parker v. Browning*, 8 Paige, 338; s. c. 35 Am. Dec. 717; *De Groot v. Jay*, 30 Barb. 483; *Taylor v. Baldwin*, 14 Abb. Pr. 166; *Miller v. Loeb*, 64 Barb. 454; *Little v. Dusenberry*, 46 N. J. 614; s. c. 50 Am. Rep. 445; *Angell v. Smith*, 9 Ves. 335; *Brooks v. Greathed*, 1 Jac. & W. 176; *Randfield v. Randfield*, 3 De G., F. & J. 766, reversing s. c. 1 Dr. & Sm. 310; *Searle v. Choate*, 25 Ch. Div. 723; *Tink v. Rundle*, 10 Beav. 318; *Evelyn v. Lewis*, 3 Hare, 472; *In re Persse*, 8 Ir. Eq. 111; *Parr v. Bell*, 9 Ir. Eq. 55;

Andrews v. Stanton, 18 Bradw. 163, 165; *Melendy v. Barbour*, 78 Va. 544; *Rogers v. Mobile & Ohio R. Co.*, (Tenn. 1883) 16 Rep. 536; *Graffenreid v. Brunswick & A. R. Co.*, 57 Ga. 22; *Henderson v. Walker*, 55 Ga. 481; *Wray v. Hazlett*, 6 Phila. 155; *Keen v. Breckenridge*, 96 Ind. 69; *Meredith &c. Sav. Bank v. Simpson*, 22 Kan. 414; *Payne v. Baxter*, 2 Tenn. Ch. 517; *Heath v. Missouri, K. & T. R. Co.*, 83 Mo. 617, 623.

⁴ *Central Trust Co. v. Wabash, St. Louis &c. R. Co.*, 23 Fed. Rep. 858; *Kennedy v. Indianapolis, C. & L. R. Co.*, 3 Fed. Rep. 97; *Melendy v. Barbour*, 78 Va. 544; *Beach on Receivers*, § 654.

⁵ The petition should, therefore, show a probable cause of action — one demanding adjudication by proceedings in court. *Jordan v. Wells*, 3 Woods, 527; *Randfield v. Randfield*, 3 De G., F. & J. 766; *Hills v. Parker*, 111 Mass. 508; s. c. 15 Am. Rep. 63.

⁶ *Eyton v. Denbigh &c. Ry. Co.*, L. R. 6 Eq. 488. Although in this same case, after the railroad company had, by deed, conveyed their superfluous land and chattels in trust

is reluctant to grant permission to sue its receiver in other forums,¹ especially where the questions to be determined are closely connected with those in the original action wherein he was appointed.² Accordingly, it is only when special facts and circumstances are shown to exist that the court will allow suit to be brought in another court.³ But so long as the receiver's possession is not disturbed or questioned parties may litigate, in the same court or elsewhere, questions concerning the ultimate right and title to the property.⁴

§ 719. The decree in suits in equity.—The prevailing rule in equitable actions against stockholders is that the decree must be drawn so as to give an opportunity to all creditors to prove their claims,⁵ and no creditor, no matter what may be his position in the litigation in point of time, is entitled to priority over the rest.⁶ Nevertheless, it should be so framed as to give the stockholders all the privileges to which they are entitled under the fundamental law of the corporation, where the stock is called in by the officers.⁷ And an

for the benefit of creditors, the court refused to allow distraint either upon the property so conveyed or upon the locomotives used in the operation of the road.

¹ *In re Mallery*, 2 N. Y. Supl. 570; *In re Platt*, 52 How. Pr. 468; *Meredith Village Sav. Bank v. Simpson*, 22 Kan. 414; *Piper v. Stratten*, (Tex. 1888) 75 W. Rep. 45.

² *Central Trust Co. v. Wabash & C. R. Co.*, 23 Fed. Rep. 858, holding that the parties should intervene.

³ *In re Platt*, 52 How. Pr. 468; *Meredith Village Savings Bank v. Simpson*, 22 Kan. 414.

⁴ *Halliday's Case*, 27 Fed. Rep. 830, 843. For a receiver is not disturbed in his possession by other courts acting after his appointment. *Blake v. Alabama & C. R. Co.*, 6 Nat. Bank. Reg. 331; *Keep v. Michigan L. S. R. Co.*, 6 Chicago Leg. News, 101; *Sedgwick v. Menck*, 6 Blatchf. 156; *Alden v. Boston, H. &*

E. R. Co., 5 Bankr. Reg. 230; *Bill v. New Albany R. Co.*, 2 Biss. 390; *Union Trust Co. v. Rockford, R. I. & St. L. R. Co.*, 7 Chicago Leg. News, 33; *Storm v. Waddell*, 2 Sandf. Ch. 494; *Hutchinson v. Green*, 6 Fed. Rep. 833; *Spinning v. Ohio L. Ins. & Trust Co.*, 2 Disney, 336; *May v. Printup*, 59 Ga. 129; *Eisenmann v. Thill*, 1 Cin. Super. Ct. Rep. 188; *Beecher v. Bininger*, 7 Blatchf. 170; *In re Clark & Bininger*, 4 Benedict, 88; *Conklin v. Butler*, 4 Biss. 22; *Mercantile Trust Co. v. Lamoille Valley R. Co.*, 16 Blatchf. 324; *Beach on Receivers*, § 20.

⁵ *Morgan v. New York & C. R. Co.*, 10 Paige, 490; s. c. 40 Am. Dec. 244.

⁶ *Robinson v. Bank of Darien*, 18 Ga. 65, 108. *Cf. Miers v. Zanesville & C. Turnpike Co.*, 13 Ohio, 197; *Jones v. Arkansas Mechanical & C. Co.*, 38 Ark. 17.

⁷ *Hightower v. Thornton*, 8 Ga. 486, 503; s. c. 52 Am. Dec. 412.

equitable contribution among all the stockholders must be ordered by the court whenever it is possible.¹ Only so much of the capital as is necessary for the payment of the debts will be called in where the court makes the assessment, and a proper apportionment is made among the stockholders.² But a stockholder can not enjoin a receiver from proceeding to enforce the balance due from him on his stock, on the ground that the whole amount due from stockholders may not be needed to pay the debts of the corporation, if all the other solvent stockholders pay the fair share of what remains due on their stock.³

§ 720. Garnishment.—After a call has been made, a creditor of the company may garnishee the stockholder.⁴ For if subscriptions are due and payable, they are, to that extent, like other debts due the corporation, subject to garnishment.⁵ But a creditor can not resort to garnishment proceedings until a call has been made, unless by the terms of the subscription the amount was payable without call,⁶ or unless, as is some-

¹ *Erickson v. Nesmith*, 46 N. H. 371.

² *Bell's Appeal*, 115 Pa. St. 88; s. c. 2 Am. St. Rep. 532. *Cf.* *Hickling v. Wilson*, 104 Ill. 54.

³ *Pentz v. Hawley*, 1 Barb. Ch. 122.

⁴ *Faull v. Alaska &c. Mining Co.*, (1882) 8 Sawyer, 520; *Meints v. East St. Louis &c. Co.*, 89 Ill. 48; *Hannah v. Moberly Bank*, 67 Mo. 678; *Simpson v. Reynolds*, (1880) 71 Mo. 594; *Curry v. Woodward*, 58 Ala. 371; *Bingham v. Rushing*, 5 Ala. 403; *Hays v. Lycoming &c. Co.*, (1882) 99 Pa. St. 621. *Cf.* "Execution against Members of Corporations," 6 Am. Jur. 468. But see *In re Glen Iron Works*, (1883) 17 Fed. Rep. 324; s. c. (1884) 20 Fed. Rep. 674; *Cucullu v. Union Ins. Co.*, 2 Rob. (La.) 571; *Bunn's Appeal*, 14 Week. N. Cases, 193. An unpaid balance due on a subscription to the stock of a corporation is a thing in action which may be sequestered in proceedings had upon a judgment against the

corporation. *Dean v. Biggs*, 25 Hun, 122.

⁵ *Faull v. Alaska G. & S. Min. Co.*, 14 Fed. Rep. 657; *De Mony v. Johnston*, 7 Ala. 51; *Meints v. East St. Louis &c. Co.*, 89 Ill. 48; *Brown v. Union Ins. Co.*, 3 La. Ann. 177, 182; *Payne v. Bullard*, 23 Miss. 88; s. c. 55 Am. Dec. 74; *Hannah v. Moberly Bank*, 67 Mo. 678; *Peterson v. Sinclair*, 83 Pa. St. 250. See Note to *Freeland v. McCullough*, 43 Am. Dec. 702; 2 *Morawetz on Corporations*, § 819.

⁶ *Lane's Appeal*, 165 Pa. St. 49; s. c. 51 Am. Rep. 166; *McKelvey v. Crockett*, 18 Nev. 238; *Paschall v. Whitsett*, 11 Ala. 472, 477; *Cooper v. Frederick*, 9 Ala. 737, 742; *Bingham v. Rushing*, 5 Ala. 403; *Brown v. Union Ins. Co.*, 3 La. Ann. 117, 182; *Hannah v. Moberly Bank*, 67 Mo. 678; *Simpson v. Reynolds*, 71 Mo. 594; *Hughes v. Oregonian Ry. Co.*, 11 Oregon, 158; *Peterson v. Sinclair*, (1877) 83 Pa. St. 250; *Langford*

times the case, this remedy be given by statute whether a call has been made or not.¹ In Pennsylvania the efficacy of attachment process is not confined to the garnishment of legal demands, but extends to those of an equitable nature, and it has been held that the unpaid subscriptions to the capital stock of an insolvent corporation can be reached by writ of attachment, although no assessment or call has been made.² But a limitation has been placed upon the right of a creditor of a corporation to resort to garnishment proceedings. It is admitted that if the corporation is solvent, and the subscription is in the form of an absolute engagement to pay the price of the stock, there is no doubt that the creditor can reach the amounts unpaid by attachment in execution, but it is denied that this can be done if the corporation be insolvent, because upon insolvency the unpaid amounts constituted a trust fund for the benefit of all the creditors.³ Although a statute which provides that, upon the return unsatisfied of an execution against a corporation, execution may on notice and motion issue against any shareholder for the amount of his unpaid balance due on shares, is retrospective, it is nevertheless valid, and applicable to a corporation chartered previously under a special act.⁴ A petition asking for an execution against a stockholder, based on a judgment against the corporation, must be filed in the court by which the judgment was rendered;⁵ for a proceeding by motion for execution against a stockholder of an insolvent corporation is in no sense the institution of an independent suit, but a mere supplementary proceeding in aid of the execution against the corporation.⁶ Under the Illinois corporation act of 1872,

v. Ottumwa Water Power Co., (1882) 59 Iowa, 283; *Chandler v. Liddle*, 10 N. B. R. 236; *In re Glen Iron Works*, 20 Fed. Rep. 674; s. c. 17 Fed. Rep. 324; *Bunn's Appeal*, (1884) 105 Pa. St. 49; *Coalfield Coal Co. v. Peck*, (1881) 98 Ill. 139. *Cf. Rand v. White Mountains R. Co.*, (1860) 40 N. H. 79; *Angell & Ames on Corporations*, § 517; *Thompson on Liability of Stockholders*, §§ 265, 276, 317; *Dean v. Biggs*, (1881) 25 Hun, 122.

¹ *Bartlett v. Drew*, (1874) 57 N. Y.

587; *Griffith v. Mangam*, (1878) 73 N. Y. 811; *Robertson v. Noeninger*, 20 Ill. App. 227; *Ala. Civ. Code*, (1887) § 2972.

² *In re Glen Iron Works*, 20 Fed. Rep. 674, affirming 17 Fed. Rep. 324; s. c. 16 Phila. 563.

³ *Lane's Appeal*, 105 Pa. St. 49; s. c. 51 Am. Rep. 166.

⁴ *Merchants' Ins. Co. v. Hill*, 86 Mo. 466.

⁵ *Paxon v. Talmage*, 87 Mo. 18.

⁶ *Kohn v. Lucas*, 17 Mo. App. 29.

making stockholders liable to creditors, garnishee process lies after judgment against the corporation; it is not necessary to proceed against the stockholders at the time of instituting suit against the corporation.¹ Under the Kansas statute, declaring that in the absence of corporate property on which to levy execution may be issued against any of the stockholders, but no execution shall issue except upon an order of the court in which the action, suit or other proceeding shall have been brought, made upon motion in open court after reasonable notice in writing to the person sought to be charged, the service of notice must be in like manner as in the case of an original summons, and jurisdiction can not be obtained by service without the State.²

§ 721. Whether the remedy in equity is exclusive.—In several States it is held that the creditor's remedy on the statutory liability is in equity alone.³ In New York there are cases seeming to hold that where there is a remedy in equity it is exclusive.⁴ So where, in South Carolina, the charter of a bank provided that upon the failure of the bank, each stockholder shall be liable and held bound, for any sum not not exceeding twice the amount of his shares, it was held

¹ Coalfield Co. v. Peck, 98 Ill. 139.

² Howell v. Marylesdorf, 33 Kan. 194; Kan. Comp. L. 1879, ch. 23, § 32.

³ Smith v. Huckabee, (1875) 53 Ala. 191; Perkins v. Sanders, 56 Miss. 783; Eames v. Doris, (1882) 102 Ill. 350; Patterson v. Lynde, (1882) 106 U. S. 519; Garrison v. Howe, (1858) 17 N. Y. 458; Brundage v. Monumental &c. Mining Co., (1885) 12 Oregon, 322. But in many States the action at law upon the statutory liability is not exclusive of the equitable remedy. Cuiver v. Third National Bank, (1871) 64 Ill. 528; Grund v. Tucker, (1869) 5 Kan. 70; Perry v. Turner. (1874) 55 Mo. 418; Norris v. Johnson, (1871) 34 Md. 485, 489; Matthews v. Albert, (1866) 24 Md.

527. Cf. Weeks v. Love, (1872) 50 N. Y. 568; Story v. Furman, (1862) 25 N. Y. 214; Garrison v. Howe, (1858) 17 N. Y. 458; Bank of the United States v. Dallam, (1836) 4 Dana, 574; Van Hook v. Whitlock, (1832) 3 Paige, 409; Bank of Poughkeepsie v. Ibbotson, (1840) 24 Wend. 473; Masters v. Rossie Lead Mining Co., (1845) 2 Sandf. Ch. 301; Pfohl v. Simpson, (1878) 74 N. Y. 137; Eames v. Doris, (1882) 102 Ill. 350.

⁴ Morgan v. New York &c. R. Co., (1843) 10 Paige, 290; Sherwood v. Buffalo &c. R. Co., (1855) 12 How. Pr. 136; Hinds v. Canandaigua &c. R. Co., (1855) 10 How. Pr. 487; Courtois v. Harrison, (1856) 12 How. Pr. 359.

by the Supreme Court of the United States, that a suit in equity by or on behalf of all the creditors is the only appropriate mode of enforcing the liability incurred by such a failure.¹ Accordingly in the United States courts, under a statute making the persons and property of the stockholders liable for notes in proportion to the number of shares that each individual may hold, the remedy is exclusively in equity.² And a claim against stockholders upon a liability imposed by statute, can not be joined in one bill in equity with a claim against the directors of the company, although the two claims are derived from the same statute;³ but an action to enforce statutory liability may be joined with an action to collect unpaid subscriptions.⁴ An action by a creditor against the corporation and delinquent stockholders may be maintained in behalf of himself and all who wish to join him, even when a creditor's bill has been abolished.⁵

§ 722. **Actions at law.**—It has been said that no one creditor can assume that he alone is entitled to what any stockholder owes, and sue at law so as to appropriate it exclusively to himself.⁶ But the weight of authority appears to be that

¹ *Terry v. Little*, (1879) 101 U. S. 216.

² *Mills v. Scott*, (1878) 99 U. S. 25; *Terry v. Tubman*, (1875) 92 U. S. 156; *Pollard v. Bailey*, (1874) 20 Wall. 520; *Cuykendall v. Miles*, (1882) 10 Fed. Rep. 342; *Patterson v. Lynde*, (1882) 106 U. S. 519. Cf. Revised Statutes of the United States, § 737; *Ogilvie v. Knox Insurance Co.*, 22 How. 380; *Sawyer v. Hoag*, (1873) 17 Wall. 610; *Terry v. Anderson*, (1877) 95 U. S. 628, 635; *Hatch v. Dana*, (1879) 101 U. S. 275; *Terry v. Little*, (1879) 101 U. S. 216; *County of Morgan v. Allen*, (1880) 103 U. S. 498; *Bullard v. Bell*, (1817) 1 Mason, 243; *Wood v. Dummer*, 3 Mason, 309; *Marsh v. Burroughs*, 1 Woods, 463; *Holmes v. Sherwood*, 3 McCrary, 405; s. c. 16 Fed. Rep. 725.

³ *Cambridge Water Works v.*

Somerville Dyeing & C. Co., (1859) 14 Gray, 193; *Pope v. Leonard*, (1874) 115 Mass. 286. Cf. *Wiles v. Suydam*, (1876) 64 N. Y. 173; *Douglass v. Ireland*, (1878) 73 N. Y. 100.

⁴ *Warner v. Callender*, (1870) 20 Ohio St. 190.

⁵ *Alder v. Milwaukee & C. Manuf. Co.*, (1860) 13 Wis. 57; *Wilbur v. Stockholders*, 18 Bankr. Reg. 178; *Ogilvie v. Knox Ins. Co.*, (1859) 22 How. 380. A receiver may be appointed and the decree affords proportional relief to all the parties. *Dalton & C. R. Co. v. McDaniel*, (1876) 56 Ga. 191; *Wilbur v. Stockholders*, 18 Bankr. Reg. 178; *Ogilvie v. Knox Ins. Co.*, (1859) 22 How. 380.

⁶ *Lane's Appeal*, 105 Pa. St. 49; s. c. 51 Am. Rep. 166; *Patterson v. Lynde*, 106 U. S. 519. Cf. *Perry v. Little*, 101 U. S. 216.

after unpaid subscriptions have been called, any one creditor may sue at law and recover the whole amount due from any one or more shareholders.¹ He need not join all the creditors nor all the shareholders of the corporation as parties plaintiff and defendant to his action.² A corporate creditor may attach so much of an unpaid subscription as has been called.³ And a sole corporate creditor in whose favor judgment has been rendered may maintain an action against shareholders, who have in their possession the assets of the corporation, and may seek a discovery, as against the corporation, of the names of such shareholders as have been withheld from him.⁴

¹ *Faull v. Alaska &c. Mining Co.*, 8 Sawy. 420; *Wilbur v. Stockholders*, 18 Bankr. Reg. 178; *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 479; *Bank of the United States v. Dallam*, 4 Dana, 574; *Allen v. Montgomery &c. R. Co.*, 11 Ala. 437; *McCarthy v. Lavasche*, 89 Ill. 270; s. c. 31 Am. Rep. 83; *White v. Blum*, 4 Neb. 555. Cf. *Holmes v. Sherwood*, 3 McCrary, 405; s. c. 16 Fed. Rep. 725; *Corning v. Mohawk Valley Ins. Co.*, 11 How. Pr. 191. And see *Van Buren v. Chenango Ins. Co.*, 12 Barb. 675.

² *Brundage v. Monumental &c. Co.*, 12 Oregon, 322. "The creditors of the corporation are seeking satisfaction out of the assets of the company to which the defendants are debtors. If the debts attached are sufficient to pay their demands, the creditors need look no further. They are not bound to settle up all the affairs of this corporation, and the equity between its various stockholders or partners, corporators or debtors." *Ogilvie v. Knox Ins. Co.*, (1859) 22 How. 380.

³ *Curry v. Woodward*, 53 Ala. 371; *Bingham v. Cushing*, 5 Ala. 403; *Brown v. Union Ins. Co.*, 3 La. Ann. 177; *Hannah v. Moberly Bank*, 67

Mo. 678; *Simpson v. Reynolds*, 71 Mo. 594; *Bunn's Appeal*, 105 Penn. St. 49; *Bank of the United States v. Dallam*, (1836) 4 Dana, 574; *Allen v. Montgomery &c. R. Co.*, (1847) 11 Ala. 437; *Faull v. Alaska &c. Mining Co.*, (1883) 8 Sawyer, 420; *Wilbur v. Stockholders*, 18 Bankr. Reg. 178; *White v. Blum*, (1876) 4 Neb. 555; *McCarty v. Lavasche*, (1878) 89 Ill. 270; *Hays v. Lycoming &c. Co.*, 99 Pa. St. 621; *Meints v. East St. Louis &c. Co.*, 89 Ill. 48. See also *Dean v. Biggs*, 25 Hun, 122; *Coalfield Coal Co. v. Peck*, 98 Ill. 139. Cf. *Rand v. White Mountain R. Co.*, 40 N. H. 79; *Hughes v. Oregonian Ry. Co.*, 11 Oregon, 158; *Peterson v. Sinclair*, 83 Pa. St. 250; *Langford v. Ottumwa Water Power Co.*, 59 Iowa, 283; *In re Glen Iron Works*, 20 Fed. Rep. 674; s. c. 17 Fed. Rep. 324; *Chandler v. Siddle*, 10 N. B. R. 236; *Bank of Poughkeepsie v. Ibbotson*, (1840) 24 Wend. 479; *Holmes v. Sherwood*, (1881) 3 McCrary, 405; s. c. 16 Fed. Rep. 725; *Corning v. Mohawk Valley Ins. Co.*, (1855) 11 How. Pr. 191; *Van Buren v. Chenango Ins. Co.*, (1852) 12 Barb. 675.

⁴ *Brewer v. Michigan Salt Assoc.*, 58 Mich. 351.

§ 723. **Interest and costs.**—When interest is recoverable upon contracts, debts and engagements of the corporation, it may be allowed thereon against the shareholder as part of his personal liability,¹ provided the allowance thereof does not make the total amount greater than that for which the shareholder is liable under the statute.² Interest will run against the stockholder from the commencement of the suit against him, when he repudiates his liability, for that is the time at which the liability accrues; and this is so even if the principal with interest is in excess of the amount of his liability.³ And under the national banking act, interest runs from the date of the comptroller's order.⁴ But if a statute creates a proportionate liability for unpaid bills, interest will not be allowed, since no stockholder can tell what he is to pay until it is ascertained by suit.⁵ Where stockholders are severally liable for corporate debts, they are also severally chargeable with the costs of a proceeding against them by creditors, even where the amount with costs exceeds their individual liability, for the reason that the creditor should not be put to the expense of a suit.⁶ But it is said that a creditor is not entitled to include in his judgment against a stockholder the costs of his proceeding against the corporation.⁷

§ 724. **Evidence — Bill of discovery.**—The stock-books of a corporation, as a rule, constitute *prima facie* evidence that the stock is owned by the individuals named as stockholders in order to make them liable for corporate debts.⁸ And this

¹ *Richmond v. Irons*, (1887) 121 U. S. 27; *Wheeler v. Millar*, (1882) 90 N. Y. 353. *son*, 99 Ill. 349; *Cole v. Butler*, 43 Me. 401.

² *Wheeler v. Millar*, (1882) 90 N. Y. 353; *Grund v. Tucker*, 5 Kan. 70. *Cf.* "Payment of Interest on the Winding-up," 18 Sol. J. & Rep. 926.

³ *Handy v. Draper*, 89 N. Y. 334; *Burr v. Wilcox*, 22 N. Y. 551; *Mason v. Alexander*, 44 Ohio St. 318; *Wehrman v. Reakirt*, 1 Cin. Sup. Ct. Rep. 230. *Cf.* *Cleveland v. Burnham*, 64 Wis. 347; *Grand Rapids Savings Bank v. Warren*, 52 Mich. 557. *Contra*, *Sackett's Harbor Bank v. Blake*, 3 Rich. Eq. 225; *Munger v. Jacob-*

⁴ *Carey v. Galli*, 94 U. S. 673.

⁵ *Grew v. Breed*, 10 Met. 569, 571; *Crease v. Babcock*, 10 Met. 524, 563.

⁶ *Cole v. Butler*, 43 Me. 401; *Grose v. Hilt*, 36 Me. 22.

⁷ *Rorke v. Thomas*, 56 N. Y. 559, 565; *Bailey v. Baucker*, 3 Hill, 188. But see *Grand Rapids Savings Bank v. Warren*, 52 Mich. 557, and *Irons v. Manufacturers' Bank*, (1888) 36 Fed. Rep. 843.

⁸ *Hoagland v. Bell*, 36 Barb. 57; *Thornton v. Lane*, 11 Ga. 459. *Cf.* *Stanley v. Stanley*, 26 Me. 191.

is also sufficient evidence to make them chargeable for unpaid subscriptions.¹ But a mere informal document not appearing to have been intended as a register can not be received as the register.² The liability imposed on the stockholders of a corporation organized under the New York act of 1848, is not taken away by the recording of the certificate that the stock is paid up, unless that be the fact, the certificate not being conclusive upon the fact of payment.³ On the other hand the provision of that act that stockholders of a corporation shall be liable to its creditors to an amount equal to the amount of their stock until the entire capital stock is paid in, and a certificate thereof made and recorded, failure to make and record the certificate within the required time renders the stockholders individually liable, although the entire capital stock has been paid in.⁴ In an action by a creditor of a corporation to enforce the statutory liability of a stockholder on the ground that his subscription is unpaid, the burden of proof is on the creditor to show the fact of non-payment.⁵ In an action against a stockholder for his proportionate share of a debt of the corporation, testimony that would be competent in a suit upon the debt against the corporation to establish the demand against it, is competent to establish the same against the stockholder.⁶ Parol evidence is not admissible to vary the terms of a subscription, or to show a discharge from liability other than as provided for by the by-laws and charter.⁷

¹ *Turnbull v. Paysop*, 95 U. S. 418; *Webster v. Upton*, 91 U. S. 65; *Glenn v. Springs*, 26 Fed. Rep. 494; *Glenn v. Orr*, 96 N. C. 413. Errors in the register not relating to the matter in dispute are immaterial. *Southampton Docks Co. v. Richards*, 1 Mann. & Gr. 448, 461; *London & Ry. Co. v. Freeman*, 2 Mann. & Gr. 606.

² *Wolverhampton & Co. v. Hawkesford*, 7 C. B. N. S. 795.

³ *Veeder v. Mudgett*, 95 N. Y. 295, construing N. Y. Laws of 1848, ch. 40.

⁴ *Plass v. Housman*, (1888) 2 N. Y.

Supl. 235, construing N. Y. Laws of 1848, ch. 40, § 10. See also *Barre Nat. Bank v. Hingham Manuf. Co.*, (1879) 127 Mass. 563; *Wheeler v. Millar*, (1882) 90 N. Y. 358; *Veeder v. Mudgett*, (1884) 95 N. Y. 295; *Thompson v. Reno Savings Bank*, (1885) 19 Nev. 103; s. c. 3 Am. St. Rep. 797.

⁵ *Wellington v. Continental Const. & Ins. Co.*, (1889) 52 Hun, 408.

⁶ *Borland v. Haven*, (1889) 37 Fed. Rep. 394.

⁷ *Marshall Foundry Co. v. Killian*, (1888) 99 N. C. 501; s. c. 6 Am. St. Rep. 539.

A bill may be maintained by creditors of a corporation for the discovery of its members upon whom a statutory liability for its debts is imposed.¹

¹ *Morgan v. New York &c. R. Co.*, pike Co., 11 Ohio St. 273. *Cf. Bogardus v. Rosendale Manuf. Co.*, 7 10 Paige, 290; s. c. 40 Am. Dec. 244; *Middletown Bank v. Russ*, 3 Conn. N. Y. 147; *Monographic Note*, 3 135; *Miers v. Zanesville &c. Turn-* Am. St. Rep. 867.

CHAPTER XXXVI.

SHAREHOLDERS' DEFENSES TO CREDITORS' BILLS.

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| <p>§ 725. Introductory.</p> <p>726. Members precluded from questioning judgment against the company.</p> <p>727. Set-off and counter-claim.</p> <p>728. Buying up claims to set-off.</p> <p>729. Payment to another creditor.</p> <p>730. Release by creditors.</p> <p>731. <i>Nul tiel</i> corporation.</p> | <p>§ 732. Illegal issue of stock.</p> <p>733. Fraud in procuring subscription.</p> <p>734. Conditions unfulfilled.</p> <p>735. Forfeiture and cancellation of stock.</p> <p>736. Estoppel.</p> <p>737. Limitation.</p> |
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§ 725. **Introductory.**—Many defenses which the company might make to actions against it by corporate creditors cease to be available after insolvency in actions against the members themselves to enforce their personal liability.¹ Courts, as a rule, look with suspicion upon defenses to creditors' actions against stockholders, and are especially apt to regard with disfavor those interposed after corporate insolvency;² so that after a corporation has become insolvent a creditor may readily enforce the payment of unpaid stock subscriptions by the subscriber; but in order to fasten the liability upon the defendant it must affirmatively appear that he is actually a stockholder and that his stock is not full paid.³ It is no defense to a creditor's action against stockholders that the officers of the corporation were guilty of fraud or neglect in the management of the company's affairs while it was in a solvent condition. Thus where a part of the outstanding capital stock of the company was purchased by the authority of the board of directors, and was subsequently cancelled without the consent of the other stockholders, the stock so cancelled not being

¹ *Vide infra*, § 726.

² *Keystone Bridge Co. v. Barstow*, (1880) 8 Mo. App. 494; *Henry v. Vermillion & Ashland R. Co.*, (1848) 17 Ohio, 187.

³ *Lathrop v. Kneeland*, (1866) 46

Barb. 432. *Cf. Mackley's Case*, (1875) L. R. 1 Ch. Div. 247. As to what constitutes a stockholder, *Wheeler v. Millar*, (1882) 90 N. Y. 353; 8 Vic. ch. 16, §§ 8, 21.

available to pay the debts of the company upon its insolvency, the action of the board was held not to be a defense in an action against a stockholder.¹ A stockholder, liable for corporate debts as to that portion of his stock subscription remaining unpaid, can not evade his liability upon the insolvency of the company or in contemplation thereof. Thus where the directors of a company took a majority of the shares, giving notes therefor secured by the stock, and upon the failure of the company one of them agreed to pay the president a certain sum to substitute his note for that of the former and take his stock, it was held that the transaction was a fraud upon the creditors of the corporation in impairing the available assets of the corporation, and therefore not a defense in an action against the director.² Illegal or irregular organization of a corporation is not a good defense by stockholders who have acquiesced in the illegality or irregularity.³ Accordingly, in an action against stockholders after corporate insolvency, it is no defense that the by-laws and stock subscriptions were illegal because the trustees were not stockholders, the defendants having acquiesced in the acts of the trustees for several years.⁴ Nor can illegality in the election of directors be set up as a defense to an action upon a subscription.⁵ It is settled in New York that no separate action by a creditor against a single stockholder to enforce the statutory liability can be maintained, but that the action must be in equity against all stockholders similarly situated.⁶ The proper form of action to enforce a statutory liability of stockholders for corporate debts is by bill in equity.⁷

¹ *In re Republican Insurance Co.*, (1873) 3 Biss. 452, where it was further held that although the charter of an insurance company gives the right to assess unpaid stock for the payment of losses exceeding the means of the corporation, this does not limit the court to assessments for the payment of losses only, but the stock may be assessed for the payment of other liabilities.

² *Nathan v. Whitlock*, (1841) 9

Paige Ch. 152. Cf. *Schley v. Dixon*, (1858) 24 Ga. 273.

³ Cf. §§ 13 and 16, *supra*.

⁴ *Ross v. Bank of Gold Hill*, (Nev. 1888) 19 Pac. Rep. 243.

⁵ *Johnson v. Crawfordsville & C. R. Co.*, 11 Ind. 280; *Eakright v. Logansport & C. R. Co.*, 13 Ind. 404.

⁶ *Wellington v. Continental & Const. Imp. Co.*, (1839) 52 Hun, 408.

⁷ *Andrews v. Bacon*, 38 Fed. Rep.

§ 726. **Members precluded from questioning a judgment against the company.**—The judgment against the corporation can be impeached only for fraud and collusion or for want of jurisdiction.¹ The shareholder can not set up by way of defense in the action against him, matters which the corporation might have pleaded, but which it failed to avail itself of.² A judgment against a corporation is really a judgment against the stockholders in their corporate capacity, and is obtained, therefore, in an action in which they are sufficiently represented.³ Accordingly, a shareholder is bound by a decree against the corporation, even though he failed to receive personal service, unless fraud be proven.⁴ So a judgment against a corporation for the recovery of money is conclusive evidence in a suit against a stockholder for the collection of the judgment, of the existence of the corporation and its liability to plaintiff therein, as thereby determined; and a judgment, whether given in an action *ex contractu* or *ex delicto*, is there-

¹ See Monographic Notes, 3 Am. St. Rep. 858; Annotations by J. C. Harper, 15 Fed. Rep. 360.

² *Graham v. Boston &c. R. Co.*, 118 U. S. 161; *Glenn v. Springs*, 26 Fed. Rep. 494; *Bissett v. Kentucky River Navigation Co.*, 15 Fed. Rep. 353; *Marsh v. Burroughs*, 1 Woods, 463; *Chaffin v. City of St. Louis*, 4 Dill. 24; *Sumner v. Marcy*, 3 Wood. & M. 105; *Milliken v. Whitehouse*, 49 Me. 527; *Merrill v. Suffolk Bank*, 31 Me. 57; *Wilson v. Pittsburgh &c. Coal Co.*, 43 Pa. St. 424; *Conway v. Duncan*, 28 Ohio St. 102; *Bank of Wooster v. Stevens*, 1 Ohio St. 233; *Henry v. Vermillion &c. R. Co.*, 17 Ohio, 187; *Hampson v. Weare*, 4 Iowa, 13; s. c. 66 Am. Dec. 116; *Grind v. Tucker*, 5 Kan. 70; *Bank of Australasia v. Nias*, 16 Q. B. 717; s. c. 20 L. J. (N. S.) Q. B. 284; *Morawetz on Corporations*, § 619; *Stephens v. Fox*, 83 N. Y. 313; *Slee v. Bloom*, 20 Johns. 669; s. c. 10 Am. Dec. 273; reversing s. c. 5 Johns. Ch. 366; *Hawes v. Petroleum Co.*, 101 Mass. 385. But see *Conant v. Van Schaick*,

24 Barb. 87; *Wilson v. Stockholders*, 43 Pa. St. 424; *Larrabee v. Baldwin*, 35 Cal. 135. Cf. *Hudson v. Carman*, 41 Me. 84.

³ *Farnum v. Ballard &c. Machine Shop*, (1853) 12 Cush. 507; *Robbins v. Justices &c.*, (1858) 12 Gray, 225; *Handrahan v. Cheshire Iron Works*, (1862) 4 Allen, 396; *Gaskill v. Dudley*, 6 Met. 546; *Hampson v. Weare*, (1856) 4 Iowa, 13; *Bullock v. Kilgour*, (1883) 39 Ohio St. 543; *Thayer v. New England Lithographic Co.*, 108 Mass. 523; *Milliken v. Whitehouse*, (1860) 49 Me. 527; *Came v. Brigham*, 39 Me. 35; *Wilson v. Stockholders &c.*, 43 Pa. St. 424; *Donworth v. Coolbaugh*, (1857) 5 Iowa, 300. Cf. *Connecticut River Savings Bank v. Fiske*, 60 N. H. 363; *Chesnut v. Pennell*, 92 Ill. 55; *Merrill v. Suffolk Bank*, (1849) 31 Me. 57; *Holyoke Bank v. Goodman &c. Manuf. Co.*, (1852) 9 Cush. 576; *Bank of Australasia v. Nias*, 16 Q. B. 717; s. c. 20 L. J. (C. B.) 284.

⁴ *Glenn v. Springs*, 26 Fed. Rep. 494.

after an indebtedness of the corporation for which a stockholder is liable to the amount due on his stock.¹ In New York it is doubtful whether the judgment against the corporation is conclusive against the shareholder.² In a recent case it is held that judgment against a private corporation is not conclusive proof of the debt in an action to recover it against the individual stockholders on the ground that the capital stock had not been fully paid in nor a certificate of its payment filed as prescribed by law.³ And in another case in the Court of Appeals it is said that "the judgment against the corporation is of no virtue or effect in the action against the stockholders, and is only evidence as proving the performance of the condition."⁴ The judgment may avail, however, in these cases, to prevent the statute of limitations from barring the action.⁵ And in other States there are cases which hold that the judgment against the corporation is only *prima facie* conclusive against the individual shareholders.⁶

§ 727. Set-off and counter-claim.— Whether a shareholder may set off against his liability to corporate creditors, claims which he himself holds against the company, depends upon the nature of the liability sought to be enforced, the distinction being between his liability at common law and under statutes which are merely declaratory of the common law, on the one hand; and, on the other hand, the additional personal liability, over and above his subscription, imposed upon the shareholder in certain kinds of companies by our modern stat-

¹ Powell v. Oregonian Ry. Co., (1889) 38 Fed. Rep. 187. But see § 151.

² Wheeler v. Millar, 90 N. Y. 353; s. c. 24 Hun, 541; Stephens v. Fox, 83 N. Y. 313; McMahon v. Macy, 51 N. Y. 155; Miller v. White, 50 N. Y. 137; Moss v. Averell, 10 N. Y. 450; Strong v. Wheaton, 38 Barb. 616; Moss v. McCullough, 5 Hill, (N. Y.) 131; s. c. 7 Barb. 279; Moss v. Oakley, 2 Hill, (N. Y.) 265; Belmont v. Coleman, 1 Bosworth, 188; s. c. 21 N. Y. 96; Conklin v. Furman, 8 Abb. Pr. (N. S.) 161. Cf. Union Bank v. Wando Mining &c. Co., (1881) 17 S. C. 339.

³ Lawyer v. Rosebrook, (1888) 48 Hun, 454.

⁴ Kincaid v. Dwinelle, 59 N. Y. 551.

⁵ Van Cott v. Van Brunt, 2 Abb. N. C. 263, 294; reversed on other points, 82 N. Y. 535.

⁶ Berger v. Williams, 4 McLean, 577; Stephens v. Fox, 83 N. Y. 313; Belmont v. Coleman, 1 Bosworth, 188; s. c. 21 N. Y. 96; Merchants' Bank v. Chandler, 19 Wis. 435; Grund v. Tucker, 5 Kan. 70. See also Bigelow on Estoppel, 89; Thompson on Liability of Stockholders, § 329, note. Cf. McMahon v. Macy, 51 N. Y. 155, 165.

utory law. In the former case counter-claims and offsets are not available in actions brought by or in behalf of corporate creditors.¹ In the latter case, the availability of the plea depends upon the language and purpose of the statute creating

¹ *In re Empire City Bank*, 18 N. Y. 199, 227; *Thompson v. Reno Savings Bank*, (1885) 19 Nev. 103; s. c. 3 Am. St. Rep. 797, annotated at length; "Set-off in Winding-up of Joint-stock Companies," 7 Irish L. T. 405; *Mudford's Case*, 14 Ch. Div. 634; *Black's Case*, L. R. 8 Ch. 254; *Gris-sell's Case*, L. R. 1 Ch. 528. Cf. *Pellatt's Case*, 2 Ch. 527; *Wheeler v. Millar*, (1882) 90 N. Y. 353; *Bissit v. Kentucky River Nav. Co.*, 15 Fed. Rep. 363. In this case the defendant corporation was indebted to plaintiff, who had exclusive control of the management of the corporation, and elected its board of directors. He brought a collusive suit, which was defended only formally by one of the directors of his creation, and obtained judgment for a large amount. He then sued a county in equity to have applied on his judgment the amount due from the county to the corporation on an unpaid subscription to its stock. And it was held that the county could be heard upon the question of the amount of the true indebtedness of the corporation to the plaintiff, notwithstanding the judgment, the county not having been a party to the first suit; and that plaintiff being himself a stockholder, must, in that capacity, contribute to the payment of the debt of the corporation to himself. *Bissit v. Kentucky River Nav. Co.*, 15 Fed. Rep. 363. Offsets and counter-claims are, however, available in actions brought by the company in its own behalf while it is yet a "going concern." *Barnett's Case*, L. R. 10 Eq. 449. And when the company while yet

solvent has allowed an offset, it can not be questioned after insolvency by corporate creditors except on the ground of fraud. *Goodwin v. McGehee*, (1849) 15 Ala. 232; *Thompson v. Meisser*, (1884) 108 Ill. 359. Cf. *Paine v. Central Vermont R. Co.*, 118 U. S. 152. Thus where a corporation made a note to a stockholder for money advanced by him, with the agreement that assessments on his stock should be considered payments on the note, and assessments for more than the amount of the note became due and the difference only was paid by the stockholder, it was held that the note was paid as between the stockholder and the corporation and as against an indorsee taking the note when overdue. *Paine v. Central Vermont R. Co.*, (1885) 118 U. S. 152. In a proceeding for the voluntary liquidation of a corporation, a stockholder who had obtained shares under an agreement with the company for full-paid stock was held to have a right of action for damages for breach of the agreement. *Mudford's Case*, (1880) L. R. 14 Ch. Div. 634. Cf. *Pellat's Case*, (1866) L. R. 2 Ch. 527. But where stock was subscribed for and taken under an agreement that the subscribers should sell certain engines to the corporation and subsequently they were unable to induce the corporation to take the engines which were built in pursuance of the agreement, it was held that against corporate creditors the subscribers were not entitled to damages as set-off against their liability as stockholders. *Black's Case*, (1872) L. R. 8 Ch. 254.

the additional liability. If the language of the act be construed as indicating an intention on the part of the legislature to create a fund to which all shareholders are to contribute and from which the creditors are to be paid ratably, the shareholder must contribute his proportion thereto and then come in with other creditors in the distribution of the corporate assets.² But if the statute imposes upon shareholders a personal liability to creditors immediate and several, so that any creditor may institute an independent action against any shareholder for the enforcement of corporate debts, then a defendant shareholder may set off debts due from the company to himself.³ But of course a claim on which the corpo-

A stockholder who is a creditor may sue a co-stockholder whose subscription is unpaid, but he must show that his own subscription is paid. *Weber v. Fickey*, (1877) 47 Md. 196.

² *Weber v. Fickey*, 47 Md. 196; *Emmert v. Smith*, 40 Md. 123; *Witters v. Sowles*, (1887) 32 Fed. Rep. 130; *Clapp v. Wright*, (1880) 21 Hun, 240; *Buchanan v. Meisser*, (1883) 105 Ill. 638; *Matthews v. Albert*, (1866) 24 Md. 527; *Briggs v. Cornwall*, (1881) 9 Daly, 436; *Hillier v. Allegheny Mutual Ins. Co.*, 3 Pa. St. 470; *Thebus v. Smiley*, (1884) 110 Ill. 316; *Terry v. Bank of Cape Fear*, 20 Fed. Rep. 777, holding that stockholders are denied the privilege of this defense in the case of a corporation formed under a statute imposing a liability, in case of insolvency, to the full amount of the stock, although upon their contribution of their proportionate indebtedness to the common fund, they are permitted to participate upon the same terms as other creditors in the distribution of the assets. *Terry v. Bank of Cape Fear*, (1884) 20 Fed. Rep. 777. So in a proceeding to wind up the affairs of the corporation in which an account is taken of all assets and liabilities, including aggregate liabilities of stockholders, a stockholder who is also a

creditor, must, in case of a deficiency, pay the amount required on his stock and take *pro rata* with other creditors. *In re Empire City Bank*, (1858) 18 N. Y. 199; *Lawrence v. Nelson*, (1860) 21 N. Y. 158; *Matthews v. Albert*, (1866) 24 Md. 527; *Emmert v. Smith*, (1874) 40 Md. 123; *Hobart v. Gould*, (1881) 8 Fed. Rep. 57; *Witters v. Sowles*, (1887) 32 Fed. Rep. 130; *Buchanan v. Meisser*, (1883) 105 Ill. 638; *Thebus v. Smiley*, (1884) 110 Ill. 316. Where a stockholder has a claim against a corporation equal to the amount of his stock, and it is one for which the stockholders are all equally liable, another creditor cannot maintain an action at law against him; but as he is interested in the fund existing for the benefit of creditors, the proper relief is by an accounting in which all parties are brought in. *Mathez v. Neidig*, (1878) 72 N. Y. 100.

³ *Wheeler v. Millar*, (1882) 90 N. Y. 353; *Mathez v. Neidig*, (1878) 72 N. Y. 100; *Agate v. Sands*, (1878) 73 N. Y. 620; *Richards v. Crocker*, (1887) 19 Abb. N. Cas. 73; *Christensen v. Colby*, (1887) 43 Hun, 362; *Tallmadge v. Fishkill*, (1848) 4 Barb. 382; *Jarman v. Benton*, (1883) 79 Mo. 148; *Boyd v. Hall*, (1876) 56 Ga. 563; *Thompson v. Meisser*, 108 Ill. 359;

ration is not legally liable is not available as a set-off.¹ And stockholders are not creditors in respect of sums paid by them to the company on their subscriptions.²

§ 728. **Buying up claims to set-off.**—But a stockholder who, under the charter of the corporation, is personally liable for its debts, can not, by buying up debts of the corporation, thus discharge his liability for more than the amount actually paid by him.³ Where a stockholder of a bank, which had

Buchanan v. Meisser, (1883) 105 Ill. 638; *Remington v. King*, (1858) 11 Abb. Pr. 278; *Briggs v. Penniman*, 8 Cow. 387. Where a stockholder had been sued by the receiver of an insolvent bank to recover an assessment upon his stock, the defendant pleaded, by way of counter-claim and set-off, an interest in the balance of a trust fund previously created by the authority of the Comptroller of the Currency to retire certain worthless securities held by the bank, and the plaintiff demurred to the plea. The demurrer was overruled on the ground that the set-off was good if, as the defendant claimed, the fund to which he had contributed was a trust fund for a special purpose and not an asset of the bank. *Welles v. Stout*, (1889) 38 Fed. Rep. 807; *Belcher v. Willcox*, (1869) 40 Ga. 391; *Garrison v. Howe*, (1858) 17 N. Y. 458.

¹ *Hiller v. Allegheny Mut. Ins. Co.*, (1846) 3 Pa. St. 470.

² Stockholders who have paid sums for which they are liable on their stock, can not participate in the division of the fund for creditors on the ground that they are creditors. *Hollister v. Hollister Bank*, (1865) 2 Abb. App. Dec. 367.

³ *Thompson v. Meisser*, (1884) 108 Ill. 359; *Sawyer v. Hoag*, 17 Wall. 610. In this case a stockholder whose stock was not full paid purchased a judgment against the cor-

poration after insolvency, and Justice Miller said: "Though it be a doctrine of modern date, we think it now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation. . . . The debt which the appellant owed for his stock was a trust fund devoted to the payment of all the creditors of the company. As soon as the company became insolvent and this fact became known to the appellant the right of set-off for an ordinary debt to its full amount ceased. It became a fund belonging equally in equity to all the creditors, and could not be appropriated by the debtor to the exclusive payment of his own claim." And it has been held in New York that a defendant stockholder, in an action to enforce his statutory liability, can not avail himself, in defense, of the fact that he has purchased judgments against the corporation, unless it also appears that he paid the full amount of the judgments. *Bulkley v. Whitcomb*, (1884) 49 Hun, 290. Likewise, where a stockholder in a joint-stock company has paid a claim against the company which was a first lien he has paid his own debt and can not, by taking an assignment of it, keep it alive and thus take precedence of subsequent lienors; and his assignee with notice occupies the same position. *Hardy*

made an assignment for the benefit of creditors, had, after the assignment, purchased claims against the bank aggregating an amount equal to his stock, and had delivered them to the assignee, who accepted them as payment of the bank's indebtedness on the claims and marked them paid, it was held, in an action against him by a creditor, that he should be allowed the actual amount paid by him, but not the face value of the claims.¹ If a stockholder, upon being sued by an admitted creditor of the corporation, enters into a collusive arrangement with a third party by which the latter obtains claims against the company, which are, by the arrangement, reduced to a judgment against the stockholder, the judgment and the satisfaction thereof can not be pleaded in bar to the first action.²

§ 729. Payment to another creditor.—Payment in good faith by a stockholder to a corporate creditor of the entire amount of his statutory liability, is a perfect defense in an action brought by another creditor of the corporation, for it amounts to a discharge of the liability.³ Whatever satisfies

v. Norfolk Manuf. Co., (1885) 80 Va. 404; *Briggs v. Cornwell*, (1881) 9 Daly, 436. It has also been held that where, in a suit to wind up the affairs of a corporation, it had been decreed that certain securities delivered to the stockholders by a purchasing company were assets of the corporation, but that a stockholder who was also a creditor of the company might elect to retain his share of the securities less the balance of the debt from him, the stockholder, by retaining the securities, had exercised his right of election. *Peters v. Ft. Madison Construction Co.*, 72 Iowa, 405; *Goodwin v. McGehee*, (1849) 15 Ala. 232.

¹ *Gauch v. Harrison*, (1883) 12 Bradw. (Ill.) 457.

² *Manville v. Karst*, (1883) 16 Fed. Rep. 173. In Nevada stockholders are not liable under the constitution for debts of the corporation, but the capital stock, and especially the unpaid subscriptions, constitute a trust

fund for the benefit of creditors; and it has been held that where a stockholder of an insolvent bank was also a creditor, having his debt collaterally secured, he must, in order to share ratably with other creditors, first pay the amount of his unpaid subscription and surrender the collateral. *Thompson v. Reno Savings Bank*, (1885) 19 Nev. 103; s. c. 3 Am. St. Rep. 797. Where the debtor of a bank, after the bank's insolvency and the appointment of a receiver, purchased notes of the bank, he can not set off the amount of the notes as against his indebtedness, inasmuch as all the creditors are entitled to share equally in its assets. *Given v. Phelps*, (1861) 34 Barb. 224.

³ *Garrison v. Howe*, (1858) 17 N. Y. 458; *Mathez v. Neidig*, (1878) 72 N. Y. 100; *Lane v. Harris*, (1854) 16 Ga. 217; *Belcher v. Willcox*, (1869) 40 Ga. 391; *Robinson v. Bank of Darien*, (1855) 18 Ga. 65, 109; *Woodruff & Beach Iron Works v. Chitten-*

or extinguishes the debt as against the corporation, extinguishes also the liability of the stockholders, because the creditor can claim only one satisfaction of the debt.¹ Thus the payment of a judgment confessed by a stockholder in favor of a *bona fide* creditor of the corporation is a good defense to an action against the stockholder by another creditor, if the payment exhausts the stockholder's liability.² And a stockholder is entitled to be credited with such amounts as he has paid in order to satisfy corporate debts, even if the amounts so paid do not, in the aggregate, cover his liability.³ So also, where the corporation becomes insolvent and its property has been disposed of, so that it can do no business, its officers also having been enjoined from the performance of their duties, the stockholders are released from their liabilities even though no judgment of dissolution is entered.⁴ If, however, a creditor has actually begun a suit to enforce the statutory liability of any individual shareholder, it is too late then for that shareholder to plead in defense the payment subse-

den, (1859) 4 Bosw. 406; Richards v. Brice, (1889) 16 N. Y. St. Rep. 1018; Boyd v. Hall, (1876) 56 Ga. 563; San Jose Savings Bank v. Pharis, 58 Cal. 380. Cf. Thebus v. Smiley, (1884) 110 Ill. 316; Delano v. Butler, (1886) 118 U. S. 634. *Contra*, Fowler v. Robinson, (1850) 31 Me. 189; Grose v. Hilt, 36 Me. 22; Young v. Brice, (1889) 3 N. Y. Supl. 123; Thompson v. Meisser, 108 Ill. 359; Buchanan v. Fishkill Iron Co., (1848) 4 Barb. 382.

¹ Young v. Rosenbaum, 39 Cal. 643, 654; San Jose Savings Bank v. Pharis, 58 Cal. 380.

² In such a case it is immaterial, in the absence of fraud, that the creditor last suing, with knowledge of the pending suit derived from the stockholder, purchased the claims sued on, at a discount, for the purpose of suing the stockholder. *Manville v. Roeder*, 11 Mo. App. 317; *Mitchell v. Beekman*, (1885) 64 Cal. 117; *Patterson v. Lynde*, 106 U. S. 519; *Harmon v. Page*, 62 Cal. 448;

Holmes v. Sherwood, 3 McCrary, 405; 1 Pomeroy's Eq. Jur., §§ 279, 281. The officers of a corporation contracted an indebtedness after the corporation had ceased to do business, and after their functions had practically ceased, and it was held that the stockholders could not be made liable for this indebtedness. *Union Bank v. Wando Mining & Manuf. Co.*, 17 S. C. 339.

³ *Kunkleman v. Rentchler*, (1884) 15 Bradw. 271; *Bulkely v. Whitcomb*, (1888) 49 Hun, 290; *Lingle v. Nat. Ins. Co.*, (1869) 45 Mo. 109; *Holland v. Heyman*, (1878) 60 Ga. 174; *Branch v. Baker*, 53 Ga. 502; *Belcher v. Wilcox*, 40 Ga. 391; *Marsh v. Burroughs*, 1 Woods, 463. A stockholder may not, however, mortgage all his property to a creditor of the corporation, for that amounts to a preference. *Gatch v. Fitch*, (1888) 34 Fed. Rep. 566; *Ingalls v. Cole*, 47 Me. 530, 541.

⁴ *Hollingshead v. Woodward*, (1885) 107 N. Y. 96.

quent to the beginning of the suit of some other corporate creditor.¹ In order to avail himself of the defense of payment, the defendant must show that he has actually paid the full amount of his liability on the claims of actual creditors of the corporation. Thus a shareholder can not buy in claims at a discount, and set them off at their face value in an action by another creditor to enforce his statutory liability.² Nor will a shareholder who has employed an agent to buy up claims, at a discount, and then confessed judgment in favor of that agent, be permitted to plead the judgment in bar of an action by other creditors.³ Payment by a stockholder, to a firm of which he was a member, of a sum equal to the amount of his stock, to satisfy a debt due from the corporation to the firm, will not extinguish his liability as stockholder to other creditors of the corporation.⁴

§ 730. Release by creditors.—The release, by its creditors, of a debt due from a corporation, operates as a release, not only of the corporation, but of the stockholders from the lia-

¹ *Jones v. Wiltberger*, (1871) 42 Ga. 575; *Lane v. Harris*, 16 Ga. 217; *Thebus v. Smiley*, (1884) 110 Ill. 316. *Contra*, *Richards v. Brice*, 3 N. Y. Supl. 941, in which it was held that payment in good faith by a stockholder of the entire amount of his statutory liability, under Laws N. Y. 1875, ch. 611, to a creditor of the company after action brought, is a good defense to an action by another creditor of the company to enforce the stockholder's liability, although the latter action was commenced before the payment was made, on the ground that the commencement of the action creates no lien on the stockholder's property. To the same effect is *Young v. Brice*, (1889) 3 N. Y. Supl. 123, where it was held that payment by the holder of fully paid-up stock of an amount equal to the par value of his stock, to a creditor of the company, although made before judgment in the action brought, is a good defense to actions

subsequently brought against the same stockholder by other creditors of the company.

² *Gauch v. Harrison*, 12 Bradw. (Ill.) 459; *Thompson v. Meisser*, 108 Ill. 359. *Cf.* *Diven v. Phelps*, 34 Barb. 224; *Balch v. Wilson*, 25 Minn. 299; *Smith v. Mosby*, 9 Heisk. (Tenn.) 501; *Sanier v. Gayoso Savings Institution*, 9 Heisk. (Tenn.) 506.

³ *Manville v. Karst*, 16 Fed. Rep. 173.

⁴ *Buchanan v. Meisser*, 105 Ill. 638. Nor is the payment of the judgments at a discount an extinction of the liability, although the judgments at full value would have satisfied it. *Kunkelman v. Rentchler*, (1884) 15 Brad. (Ill.) 271. Where, at the request of the directors of a corporation, the creditors thereof grant an extension of time for the payment of their debts, the extension will not release the stockholders from a statutory personal liability for its debts. *Aultman's Appeal*, 98 Pa. St. 505.

bility imposed by statute.¹ So where property is conveyed by incorporators to a trustee and accepted by him in full payment of the stock of the company, and is subsequently reconveyed by him to the original owners, a creditor who is also a stockholder and consents to the reconveyance has no right of action against the other stockholders.² Likewise when a promissory note, signed with the name of a corporation by its treasurer, and indorsed with its name by its directors, is delivered to a person under an agreement between him and the corporation "that there should be no personal liability on the note,"

¹ *Mohr v. Minnesota Elevator Co.*, 40 Minn. 343; *Bank of Ft. Madison v. Alden*, (1889) 129 U. S. 372; *Brown v. Eastern Slate Co.*, 134 Mass. 590; *Parrott v. Colby*, (1875) 6 Hun, 55; s. c. affirmed, (1877) 71 N. Y. 597. Cf. *Aultman's Appeal*, (1881) 98 Pa. St. 505; *Hanson v. Donkersley*, 37 Mich. 184; *Grand Rapids Savings Bank v. Warren*, 52 Mich. 557; *Jagger Iron Co. v. Walker*, (1879) 76 N. Y. 521; *Stilphen v. Ware*, 45 Cal. 110; *Sutherland v. Olcott*, (1884) 95 N. Y. 93, reversing s. c. 29 Hun, 161; *Jones v. Barlow*, (1875) 62 N. Y. 202. The company may contract for the exemption of its members from statutory liability. *In re Athenæum &c. Society*, (1859). 3 De G. & J. 660; *Halket v. Merchant Traders' &c. Assoc.*, (1849) 13 Q. B. 960; *Durham's Case*, (1858) 4 Kay & J. 517; *Shelford on Joint-stock Companies*, (2d London edition) 4. Where members are severally liable under the statute, the release of one does not, of course, release others. *Bank of Poughkeepsie v. Ibbotson*, (1843) 5 Hill, 561. Cf. *Herries v. Platt*, (1880) 21 Hun, 132; *Jagger Iron Co. v. Walker*, (1879) 76 N. Y. 521.

² A number of persons owning timber lands formed a corporation for the manufacture and sale of lumber, and the lands were conveyed to a trustee for the benefit of the cor-

poration, according to an agreement by which each member was to receive stock in proportion to his individual interest in the lands, the trustee accepting the lands in full payment of the shares; and it was held that a creditor of the corporation having full knowledge of the facts could not enforce a liability against a stockholder on the ground that the land conveyed by him was worth much less than the stock received therefor, and that therefore he was indebted to the corporation. Where the lands conveyed to the trustee are subsequently reconveyed by him to the original owners, a creditor of the corporation, who was also a stockholder and consented thereto, has no right of action against a stockholder on the ground that the lands retained their trust character after such reconveyance. *Bank of Fort Madison v. Alden*, (1889) 129 U. S. 372. Assuming that the general insolvency law of Minnesota applies to corporations, a release of a debt due from a corporation by its creditor, and a judgment of a court discharging the debtor pursuant to the provisions of the insolvency law, releases and discharges the stockholders in the corporation from the personal liability imposed by Const. art. 10, § 3. *Mohr v. Minnesota Elevator Co.*, (1889) 40 Minn. 343.

and he afterwards recovered judgment against the corporation in an action at law upon the note, it was held, on a bill in equity against the stockholders of the corporation to enforce payment of the judgment, that it was meant that there should be no statutory liability on the part of the stockholders; and that this agreement was admissible in defense, and was not merged in the judgment.¹ It is also held that if a corporation issue new shares after the claim of a creditor arose, he, not having dealt with the company on the faith of any capital represented thereby, can not insist on the holders of the new shares contributing a greater amount of capital than the corporation itself could claim from them as part of its assets.² Whether an extension given to the corporation by a creditor will discharge a shareholder as to his liability by statute seems uncertain. In a New York case it has been held that it would not.³ But although it is binding as between themselves, stockholders can not limit their liability by agreement, as by undertaking to make their stock

¹ *Brown v. Eastern Slate Co.*, 134 Mass. 590; *Parrott v. Colby*, (1875) 6 Hun, 65; s. c. affirmed, (1877) 71 N. Y. 597; *Jagger Iron Co. v. Walker*, (1879) 76 N. Y. 521; *Hardman v. Sage*, (1888) 47 Hun, 230; *Stilphen v. Ware*, (1872) 45 Cal. 110; *Jones v. Barlow*, (1875) 62 N. Y. 202; *Bolen v. Crosby*, (1872) 49 N. Y. 183.

² *First Nat. Bank of Deadwood v. Gustin Minerva Con. Mining Co.*, (1890) 8 Ry. & Corp. L. J. 175. In this case Mitchell, J., said: "If a corporation issue new shares after the claim of a creditor arose, it is clear that the latter could not have dealt with the company on the faith of any capital represented by them. Whatever was contributed as capital in respect of the new shares was a clear gain to the creditor's security. So, too, if a party deal with a corporation with full knowledge of the fact that its nominal paid-up capital has not in fact been paid for in money or property to the full amount

of its par value, he deals solely on the faith of what has been actually paid in, and has no equitable right to insist on the contribution of a greater amount of capital by the shareholders than the corporation itself could claim as parts of its assets. *Colt v. Amalgamating Co.*, 14 Fed. Rep. 12; s. c. 119 U. S. 343. This doctrine with respect to trusts has no application to a case where a party, like the plaintiff, was cognizant of the whole arrangement under which the stock of the defendant company was issued, and of what was paid or intended to be paid for it, and who accepted a novation of its debt with full knowledge of these facts, and received as great or greater security for it than it had before. To hold otherwise would be to perpetrate a fraud on the stockholders, and not on their creditors."

³ *Harger v. McCullough*, (1846) 2 Denio, 119.

non-assessable.¹ And where two corporations make a valid agreement by which the indebtedness of one to the other is extinguished, it is competent for them to rescind the contract and restore the original indebtedness and make the stockholders of the debtor corporation liable as before.²

§ 731. **Nul tiel corporation.**—It is a general principle that a person dealing with a corporation can not set up irregularities occurring in the incorporation, where no act which is a condition precedent to its existence has been omitted.³ But while it is true that when one contracts with a corporation in such a manner as to recognize its existence either *de jure* or *de facto* he will often be estopped from denying the fact of corporate existence, yet such cases arise where the corporation sues one who has contracted with it in its real or supposed corporate capacity, and the principle has no application to cases where subscriptions for stock are made in anticipation of incorporation; and to justify a finding that a person is estopped from denying the existence of a corporation on the ground that he has participated in its organization and acts, it must appear that they were performed in its corporate capacity. Thus when a corporation sued subscribers to recover the balance of their unpaid subscriptions, it was held that the fact that they had paid all their subscription except the amount sued for did not estop them from denying the existence of the corporation.⁴

¹ Union Mutual Ins. Co. v. Frear Stone Manuf. Co., (1881) 97 Ill. 537; Dane v. Young, (1872) 61 Me. 160.

² Borland v. Haven, (1888) 37 Fed. Rep. 394.

³ Lessee of Frost v. Frostburg Coal Co., (1860) 24 How. 278. And although the law under which a corporation is formed is unconstitutional, in an action by the corporation against a stockholder who has been a director and participated in calls upon the subscribers for payment of installments upon their subscriptions, the defendant is es-

topped from denying the existence of the company. Weinman v. Wilkinsburg & E. L. Pass. Ry. Co., (1888) 118 Pa. St. 192; Pope v. Capitol Bank, (1878) 20 Kan. 440; Holbrook v. St. Paul Fire & Marine Ins. Co., (1878) 25 Minn. 229.

⁴ Schloss v. Montgomery Trade Co., (1888) 87 Ala. 411. Unless the requirements of the statute under which a corporation is formed, have been complied with, it can not maintain an action against a subscriber to enforce the payment of assessments upon his stock. Anvil Min-

§ 732. **Illegal issue of stock.**— A subscriber to stock issued in excess of the amount allowed by law, is not liable on his subscription;¹ and if an overissue of stock is proved it constitutes a defense in an action by the company or by its assignee in insolvency.² For certificates of stock of an incorporated company issued in excess of its charter limit are void and the holder of them is entitled to none of the rights and subject to none of the liabilities of the holders of authorized stock.³ He is not estopped to set up the invalidity of the stock in an action by creditors, by the fact that he attended the meeting at which it was voted.⁴ A holder both of valid and of spurious stock, can not offset his claim against the corporation upon the latter as against its claim against him for assessments upon the former, when the corporation has become insolvent.⁵ This is according to the general rule whereby all debts owing the corporation on unpaid subscriptions are considered a trust fund devoted to the payment of all the creditors of the company, which upon the insolvency of the corporation equitably vests in all its creditors to be equally divided among them *pro rata*.⁶

ing Co. v. Sherman, (1889) 74 Wis. 226. And where a corporation continued to do business after the expiration of its term of existence under its charter, and one of its members sold property for it in the course of its business and collected the proceeds, he was not estopped from denying its existence in an action brought by it against him to recover the money. The proper remedy was a suit for an accounting by another stockholder bringing in all the stockholders. Krutz v. Paola Town Co., (1878) 20 Kan. 397. Where a corporation has not been properly organized, its records are not admissible as evidence of an agreement among the proposed shareholders for the purpose of charging them as partners. Fay v. Noble, (1851) 7 Cush. 188; Merchants' Nat. Bank of Bing-

hampton v. Pendleton, (1890) 8 Ry. & Corp. L. J. 492.

¹ Clark v. Turner, 73 Ga. 1.

² An insurance company, authorized to commence business with a capital of \$100,000, received \$113,000, after which it received a subscription from A. for \$12,000, as "treasurer in trust." It immediately thereafter organized and elected A. treasurer, and it was held that A. was not liable individually upon his subscription either to the company or its assignee in insolvency. Russell v. Bristol, 49 Conn. 251.

³ Scovill v. Thayer, 105 U. S. 143.

⁴ Scovill v. Thayer, 105 U. S. 143.

⁵ Scovill v. Thayer, 105 U. S. 143.

⁶ County of Morgan v. Allen, 103 U. S. 498; Scammon v. Kimball, 92 U. S. 362; Upton v. Sawyer, 91 U. S. 56; Sawyer v. Hoag, 17 Wall. 610.

§ 733. **Fraud in procuring subscription.**—In case of corporate insolvency the equities of the creditor supersede those of the subscriber, even when his subscription has been induced by fraud. While ordinarily the law does not readily presume acquiescence or waiver in the case of subscriptions procured through fraud, nor hasten to impute laches to subscribers so deceived by the corporate agents; yet when the corporation has become insolvent, a contract of subscription procured through fraud can not be rescinded to the prejudice of the rights of creditors. One induced by fraud to purchase shares of stock in a corporation can not avoid his purchase if, after becoming aware of the fraud, he acts as a shareholder or derives a benefit from his shares.¹ The fact that a stockholder is induced to take his stock upon the false representation of the president of the corporation that it is full paid capital stock, is no defense in an action by judgment creditors of the corporation on his statutory liability.² And when the subscriber has waited until suit has been brought by a receiver, it is then too late for him to plead fraudulent misrepresentation;³ although the fraud was not discovered until after in-

¹ *City Bank v. Bartlett*, (1885) 71 Ga. 797; *Chubb v. Upton*, (1877) 95 U. S. 665, 667; *Upton v. Tribilcock*, (1875) 91 U. S. 45; *Webster v. Upton*, (1875) 91 U. S. 65; *Sanger v. Upton*, (1875) 91 U. S. 56; *Farrar v. Walker*, (1876) 13 Bankr. Reg. 82; *Ogilvie v. Knox Ins. Co.*, (1880) 23 Hun, 380; *Ruggles v. Brock*, (1876) 6 Hun, 164; *Duffield v. Barnum*, (1887) 64 Mich. 293; *Tennent v. City Bank of Glasgow*, (1879) L. R. 4 App. Cas. 615; *Burgess' Case*, (1880) 15 Ch. Div. 507; *Oakes v. Turquand*, (1867) L. R. 2 H. L. App. Cas. 325; *Wright's Case*, (1871) L. R. 12 Eq. Cas. 331; *Clarke v. Dickson*, (1859) 27 L. J. Q. B. 223; *Collins v. Collins*, 3 C. P. Div. 282; *Mixer's Case*, (1859) 4 De Gex & J. 575.

² *Briggs v. Cornwell*, 9 Daly, (N. Y.) 436. In this case the defendant held certain bonds, bearing an indorsement by the president, purporting

to be a guaranty by the corporation of their payment, and of certain notes of the corporation, payable on demand, together amounting to more than the stock held by him, and all acquired after the corporation had become insolvent, the original consideration for the bonds, the guaranty, or the notes not being shown, and these facts were held not to be available in defense.

³ *Upton v. Tribilcock*, (1875) 91 U. S. 45; *Ruggles v. Brock*, (1876) 6 Hun, 164. "Since the decision of the *Oakes Case* in the House of Lords, 16 L. T. Rep. N. S. 808, particularly, if regard be had to the Lord Chancellor's judgment, there is an element of clear distinction, in determining the rights of such a member, according as the company is of the one or the other class. The Lord Chancellor held that where an order had been made to wind up a

solvency.¹ Even impending insolvency, before an actual assignment or appointment of a receiver, may bar the subscriber's remedy.² Where there are unpaid debts of the corporation incurred subsequent to the subscription of the defendant, it is no defense that the amount paid by him on his subscription was obtained by the fraudulent representations of the officers of the company, when he had continued to act with the directors after the discovery of the fraud and until the company ceased to do business.³ But if the proceedings have been commenced by a shareholder before the company has become insolvent his remedy will not be destroyed by a subsequent winding-up order.⁴

§ 734. Conditions unfulfilled.—Where an individual subscribes for stock in a corporation on certain conditions to be performed, his liability as a stockholder does not become complete until the conditions have been met; for the question whether the subscription makes him a stockholder depends upon the terms of the contract, the charter, and whether the subscription was a step preliminary to organization.⁵ Thus

company, the liability of a shareholder was a statutable liability, under which the creditors had a right attaching upon a person who had agreed to become a shareholder to contribute to the extent of his shares towards the payment of the debts of the company. Hence he found fault with the decision of the Lords Justices in the case of the Reese River Silver Mining Co., *Ex parte* Smith, 16 L. T. Rep. N. S. 549. Although there was no doubt that Smith had been led to take shares in the company by the false representations of the flourishing condition of the mines contained in the prospectus, yet when the order for winding-up the company was made, his name was upon the register; it was true that he had filed his bill against the company to be relieved of his shares, but he still held them, and the winding-up order found him in the condition

of a person who had agreed to become a member, and whose name was upon the register, and who therefore exactly answered the description of a contributory contained in the Companies Act of 1862." "Relief from Shares," 44 L. T. 40.

¹Turner v. Grangers' &c. Insurance Co., (1880) 65 Ga. 649.

²Oakes v. Turquand, (1867) L. R. 2 H. L. 325; Stone v. City & County Bank, (1877) 3 C. P. Div. 283; Steele's Case, (1879) 28 W. R. 241; Tennent v. City of Glasgow Bank, (1879) 4 App. Cas. 615.

³Hamilton v. Grangers' Life & Health Ins. Co., (1881) 67 Ga. 145.

⁴Rees Silver Mining Co. v. Smith, (1869) L. R. 6 H. L. 64; Henderson v. Lacon, (1867) 6 Eq. 249.

⁵Butler University v. Scoonover, (1887) 114 Ind. 381; Appeal of Halin, (Pa. 1887) 7 Atl. Rep. 482; Brand v. Lawrenceville Branch R. Co., 22

where a subscription is made on the condition that the whole amount of the capital stock should be a fixed sum, the subscriber is not liable for corporate debts until the whole amount is subscribed;¹ and where two subscriptions were void, being made by married women, and as a matter of fact were never paid, it was held that the condition had not been complied with.² But the rights of the subscriber in such cases may be waived, and he may be bound by his subscription, even though the conditions upon which he relied have failed.³ But in order

Fed. Rep. 532; *Callanan v. Windsor*, 78 Iowa, 193.

¹ *Temple v. Lemon*, (1886) 112 Ill. 51.

² *Appeal of Halin*, (Pa. 1887) 7 *Atlan. Rep.* 482. One subscribed for stock in a projected railroad, and, in consideration of the subscriptions, the company agreed to deposit collaterals to secure him. After he had paid a portion of his subscription, the company made such a disposition of the collaterals as to put them beyond his control, contrary to the contract of subscription; and it was held that he was released from his obligations. *Reusens v. Mexican Nat. Construction Co.*, 22 *Fed. Rep.* 522.

³ *Musgrave v. Morrison*, (1880) 54 *Md.* 161; *Morrison v. Dorsey*, 48 *Md.* 468; *Hager v. Cleveland*, (1872) 36 *Md.* 476. *Cf.* *Boston &c. R. Co. v. Pearson*, 128 *Mass.* 445. In an article entitled "Delay in Repudiating Shares," in the *Solicitors' Journal and Reporter*, in the course of a discussion of the necessity of promptness in the rescission of the contract of subscription it is said: "In disposing of this topic we saw that there was a considerable difference according to the nature of the claim to rescission — *i. e.*, whether the contention be (1) 'I admit that I agreed to take shares in the company, but I say that my agreement was pro-

cured by fraud' (misrepresentation); or (2) 'I admit that I agreed to take shares in a company, but it was a different company to that in which I have been registered' (variation); or (3) 'I deny that I have agreed to take shares in any company at all' (*e. g.*) when the allotment was made too late, or accompanied by an unaccepted condition. . . . Repudiation must not lag far behind discovery. If suspicions have been aroused, the court expects that the party should forthwith take the trouble of satisfying his mind one way or the other. It will not hear of his shutting his eyes and afterwards urging that he had not seen anything until &c. &c. happened (see *Lord Cairns in Ogilvie v. Currie*, 16 *W. R.* 769). Doubtless many persons would like to hold on to their shares as long as possible, so as to take the benefit of every chance of the concern turning out well, and repudiate if it became hopeless. This, however, is precisely what the court very sternly sets its face against. . . . Acquiescence is founded on knowledge, and a man can not be said to have acquiesced in a transaction if he is not proved to have had knowledge of it. *Stewart's Case*, *L. R.* 1 *Ch. App.* 574, *per* Lord Justice Turner. . . . In *Lawrence and Kincaid's Cases*, *L. R.* 2 *Ch. App.* 412, 426; *s. c.* 15 *W. R.*

that this defense may be made available in a creditor's action against a stockholder, it must appear that there was a condition precedent to liability. The subscriber can not create unreal conditions for the purposes of defense. Thus in an action in behalf of creditors of a corporation, to recover upon a subscription to its capital stock, where the answer admits the purchase of the stock, but alleges a subsequent surrender of it, and a discharge of the obligation to pay therefor, the fact that all of the authorized capital stock may not have been taken, is not available in defense.¹

571, the memorandum was not registered when these gentlemen applied for shares. Lord Cairns, L. J., said the applicant 'must be taken to have known either that this memorandum was prepared and accessible at the time of his application, or that it must be prepared forthwith; and that in either case, both it and the articles must, in their very nature, be documents differing widely in form from, and, in all measures of detail at least, going beyond the prospectus; and with regard to documents of this description, on the mode of framing which consistently with the prospectus so much difference of opinion might well arise, it would be contrary to the first principles of justice to hold that Mr. Lawrence was at liberty to remain wholly passive, content to trust to what was stated in the prospectus, and, while he knew that an authority to register his name and hold him out as a shareholder had been given and probably acted upon, keeping himself in a position to ratify all that had been done, if the company turned out prosperous, but for the first time to inquire, and, if possible, repudiate should a financial panic come, or the speculation turn out unsuccessful.' . . . In *Wilkinson's Case*, 15 W. R. 33; s. c. L. R. 2 Ch. App. 536, Turner, L. J., said that the fact

of the party having paid calls threw on him the *onus* of proving that he did not know of the variance, and it was not enough that he said he had not seen the articles. Lord Cairns thought that 'where a man agrees to take shares and to be bound by the memorandum and articles, he must be affected with notice of their contents, unless, at all events, within a reasonable time during which he can acquire knowledge of the contents he repudiates the shares.' . . . In *Peel's Case*, 15 W. R. 1100; s. c. L. R. 2 Ch. App. 674, Lord Cairns repeated what he had said in *Lawrence's Case*, and said that if the memorandum and articles were in existence when the party applied for shares, and if he agreed to take on the footing of them, he ought to be held bound to look before he applied. Where they were not in existence when the application was made, he ought to look, at latest, when he received the allotment."

¹ *Farnsworth v. Robbins*, (1887) 36 Minn. 369. A stipulation in a contract of subscription to organization stock of a corporation, that bonds secured by first mortgage on the company's plant shall be issued to the subscriber to the full amount of his subscription, is not to be regarded as a condition precedent to liability upon the subscription; for it is noth-

§ 735. **Forfeiture and cancellation of stock.**—Where the officers of a corporation, in good faith, declare certain stock to be forfeited under a power conferred upon them by the statute or charter pursuant to which the company was organized, the person in whose name the stock stands upon the books of the company, is freed from liability, in respect not only to the company and his co-stockholders, but also to the corporate creditors,¹ and this is true whether the debts were created before or after the forfeiture of the stock.² But the officers of a corporation have no power to declare stock forfeited and to cancel it, unless it is for the benefit, not only of the creditors, but also for that of the stockholders and the State, for the directors are the trustees of all the stockholders and of the State as well.³ The power can not be exercised

ing more than an independent stipulation, for the breach of which the remedy would be in damages; so that where the subscriber paid part of his subscription in cash, giving notes, to be paid upon call, for the balance, and having become a director, after the organization was completed, without receiving his bonds, the defense of unfulfilled condition to a creditor's action was held not good, especially as the mortgage to secure the bonds could only be obtained by payment of the fund subscribed. *Morrow v. Nashville &c. Co.*, (1889) 87 Tenn. 262; s. c. 10 Am. St. Rep. 658.

¹ *Mills v. Stewart*, 41 N. Y. 384; *Allen v. Montgomery &c. R. Co.*, 11 Ala. 437, 450; *Macaulay v. Robinson*, 18 La. Ann. 619; *Ex parte Beresford*, 2 Macn. & G. 197; *Woolaston's Case*, 4 De Gex & J. 437; *Kelk's Case*, L. R. 9 Eq. 107; *Dawes' Case*, L. R. 6 Eq. 232; *Snell's Case*, L. R. 5 Ch. 22. And where stock had been issued as a stock dividend, upon the false pretense that it had been earned, and was afterward cancelled, it was held that as to such stock the defendant was released from liability

upon corporate debts, the stock having been cancelled before the debts were created. *Hollingshead v. Woodward*, 35 Hun, 410. The A. insurance company, as part of a contract of reinsurance, transferred its assets to the B. insurance company. The B., under the agreement, issued its stock in exchange for the stock of the A., and redeemed it at par. The A. was in fact insolvent, and a receiver was afterwards appointed, who sued a former stockholder in the A. who had thus exchanged his stock and redeemed it at par, to recover the amount thus received by him, and it was held that the action could not be maintained. *Bent v. Hart*, 73 Mo. 641, *Sherwood, C. J.*, dissenting; s. c. 10 Mo. App. 143.

² *Mills v. Stewart*, (1869) 41 N. Y. 384. But the power of forfeiture must be exercised under the authority conferred by the statute creating the corporation; there is no such power at common law. *Creyke's Case*, L. R. 5 Ch. 63.

³ *Bedford R. Co. v. Bowser*, (1864) 48 Pa. St. 29. Nor is a forfeiture proper in case the stockholder is responsible. *Chouteau v. Dean*, 7 Mo.

in behalf of any one shareholder, but is only to be used where the interests of the corporation, its creditors and all the shareholders demand it. Therefore when the directors of a company, who had the power in their discretion to sue a shareholder for unpaid calls on his stock, or to declare it forfeited, agreed to relieve him of further liability on condition that he would consent to an absolute forfeiture, but afterwards discovered that he was solvent and refused to perform, it was held that they could not be compelled specifically to perform the contract.¹ Where a stockholder who has not paid anything for his stock surrenders it to the corporation, he can not be held liable to a creditor of the corporation whose claim first accrues after the surrender.² A subscriber to stock is liable to the creditors of the corporation to the amount of his unpaid subscription, although payment was to be in property, and he had, by agreement with the corporation, surrendered all claim for stock, and it had released all claim on the property.³

§ 736. Estoppel.—Inasmuch as outsiders dealing with the corporation have no means of knowing of its financial condition except the public acts and records and declarations of its officials and stockholders, they have a right to rely upon them; and stockholders who have participated in corporate acts and made themselves responsible for representations to third parties by their assent, express or implied, can not evade their liability to corporate creditors. Thus when a subscription to the capital stock of a corporation is made for the purpose

App. 211; *Spachman v. Evans*, L. R. 3 H. L. 171. Cf. *Bedford R. Co. v. Bowser*, (1864) 48 Pa. St. 29. A forfeiture brought about by collusion between the stockholder and the directors, will not relieve him of liability either to the corporation or its creditors. *Burke v. Smith*, 16 Wall. 394; *Mills v. Stewart*, (1869) 41 N. Y. 384, 386; *Slee v. Bloom*, 19 Johns. 456; *Hall's Case*, L. R. 5 Ch. 707; *In re Agricultural Ins. Co.*, L. R. 1 Ch. 161; *Stanhope's Case*, L. R. 1 Ch. 161; *Stewart's Case*, L. R. 1 Ch. 511; *Gower's Case*, L. R. 6 Eq. 77;

Spachman's Case, 11 Jur. N. S. 207; *Richmond's Case*, 4 Kay & J. 305; *Walters' Second Case*, 3 De Gex & Sm. 244. And a forfeiture which is intentionally fraudulent may be enjoined, and, when consummated, set aside. *Germantown & c. R. Co. v. Fidler*, 60 Pa. St. 124.

¹*Harris v. North Devon Ry. Co.*, (1855) 20 Beav. 384. See also *Price v. Denbigh & c. Ry. Co.*, 38 L. J. Ch. 461.

²*Johnson v. Lullman*, (1885) 15 Mo. App. 55.

³*Singer v. Given*, 61 Iowa, 93.

of subsequent organization, which is afterwards had, and the subscriber pays part of his subscription, and transfers shares, he thereby recognizes and affirms his contract of subscription.¹ So, persons who subscribe to stock and participate in an irregular formation of a corporation become a corporation *de facto*, if not *de jure*, and as such are liable at least to the extent of the stock subscribed by them;² and one who participates in the organization of a company and acts as its president, waives any irregularities therein, and upon him the by-laws and charter are binding.³ But whether one who subscribes for stock in a corporation is thereafter estopped from denying his liability as a stockholder, depends upon the terms of his contract of subscription and the organic law of the corporation. When the corporation, in its correspondence, uses letter-heads upon which is a statement purporting to be the amount of the capital stock, the officers and stockholders are not estopped from denying that the amount indicated was the actual capital stock.⁴ Nor, in an action by a corpo-

¹ Bell's Appeal, 115 Pa. St. 188. The payment of one invalid assessment upon stock is not a waiver of another. *Atlantic De Laine Co. v. Mason*, (1858) 5 R. I. 463. *Cf.* *Field v. Pierce*, (1869) 102 Mass. 253; *Cover v. Manaway*, (1886) 115 Pa. St. 338; *Thompson v. Reno Savings Bank*, (1885) 19 Nev. 103; *Inter-Mountain Publishing Co. v. Jack*, 5 Mont. 568.

² *Marshall Foundry Co. v. Killian*, (1888) 99 N. C. 501; s. c. 6 Am. St. Rep. 539.

³ *Marshall Foundry Co. v. Killian*, (1888) 99 N. C. 501; s. c. 6 Am. St. Rep. 539. Where one, prior to the incorporation of a turnpike company, subscribed a certain amount to its capital stock, to be paid when the incorporation was completed and work begun, the subscription is not a mere voluntary donation, but is enforceable, having been made in consideration of receiving a property right as stockholder in the road; and other persons having subscribed on

the faith of that subscription, and work having been commenced, the subscriber is estopped to deny the subscription. *Bullock v. Falmouth & Chipman Hall Turnpike Road Co.*, (1887) 85 Ky. 184. In an action to recover from defendant a debt of a manufacturing corporation, on the ground that the capital stock had not been fully paid in, it appeared that defendant had signed the articles of incorporation, had subscribed for stock, was a trustee and secretary of the corporation, and actively engaged in its management, and that his name was recorded in the corporate books as a stockholder. It was held, that he was a stockholder, although he had neither paid for his stock nor received a certificate for it. *Wheeler v. Millar*, 90 N. Y. 353. *Acc.* *Griswold v. Seligman*, (1880) 72 Mo. 110.

⁴ *Warfield, Howell & Co. v. Marshall County Canning Co.*, (1887) 72 Iowa, 666.

rate creditor against a stockholder, is the defendant bound by entries in the books of the corporation.¹

§ 737. **Limitation.**—Actions by corporate creditors against stockholders to enforce their individual liability, may, like other actions, be barred by limitation;² and in the absence of special statutes, applicable only to this liability, the general statute, by which the right of action on ordinary contracts is barred, controls.³ In New York, where the General Manu-

¹Nielson v. Crawford, (1877) 52 Cal. 248. Where a subscriber gives to a corporation a bond which assumes that the obligor has subscribed for stock and has retained the subscription price as a loan for which the bond is given, it appearing that he had never subscribed for nor received any stock, the obligor is not estopped from denying that he is a stockholder. Butler University v. Scoonover, (1887) 114 Ind. 381; s. c. 5 Am. St. Rep. 627.

² Vide supra, § 552.

³Gridley v. Barnes, 103 Ill. 211; Diversey v. Smith, (1882) 103 Ill. 378; Cable v. McCune, 22 Mo. 380; Lawlor v. Burt, (1857) 7 Ohio St. 341; Cady v. Smith, (1882) 12 Neb. 628; Knox v. Baldwin, (1880) 80 N. Y. 610; Duckworth v. Roach, (1880) 81 N. Y. 49; Terry v. Tubman, (1875) 92 U. S. 156; Knox v. Baldwin, (1880) 80 N. Y. 610; Hawkins v. Furnace Co., (1884) 40 Ohio St. 507; Prince v. Yates, 7 Weekly Notes, 51 (U. S. C. C., Pa. 1879); Hollingshead v. Woodward, (1887) 107 N. Y. 96; King v. Duncan, (1886) 38 Hun, 461; Phillips v. Therasson, (1877) 11 Hun, 141; Bullard v. Bell, (1817) 1 Mason, 243, 289; Thornton v. Lane, (1852) 11 Ga. 459; Lane v. Morris, (1851) 10 Ga. 162; Corning v. McCullough, (1847) 1 N. Y. 47; Jagger Iron Co. v. Walker, (1879) 76 N. Y. 522; Terry v. Calnan, 13 S. C. 220; Lawlor v. Burt, 7 Ohio St. 340; King v. Dun-

can, (1886) 38 Hun, 461; Stilphen v. Ware, (1872) 45 Cal. 110; Shellington v. Howland, (1873) 53 N. Y. 371; Birmingham National Bank v. Mosser, (1878) 14 Hun, 605; Lindsley v. Simonds, (1866) 2 Abb. Prac. (N. S.) 69. Cf. State Sav. Assoc. v. Kellogg, (1873) 52 Mo. 583; Freeland v. McCullough, (1845) 1 Denio, 414, 422; Merchants' &c. Co. v. Bliss, (1860) 21 How. Pr. 366, affirmed 35 N. Y. 414; Davidson v. Rankin, (1868) 34 Cal. 503; Godfrey v. Terry, (1877) 97 U. S. 171; Conklin v. Furman, (1865) 8 Abb. Pr. (N. S.) 164; Schalucky v. Field, (Ill. 1888) 16 N. E. Rep. 904; Bank of Poughkeepsie v. Ibbotson, (1840) 24 Wend. 473; Carrol v. Green, (1875) 92 U. S. 509; Baker v. The Atlas Bank, (1845) 9 Metc. 182; Lindsay v. Hyatt, (1842) 4 Edw. Ch. (N. Y.) 104; Van Hook v. Whitlock, (1832) 3 Paige, 409; Green v. Beckman, (1881) 59 Cal. 545; s. c. 38 Fed. Rep. 777; Wiles v. Suydam, (1876) 64 N. Y. 173, 176; Mappier v. Mortimer, (1871) 11 Abb. Prac. (N. S.) 455; Commonwealth v. Cochituate Bank, (1861) 3 Allen, 42; Terry v. McLure, (1880) 103 U. S. 442; Lewis v. Ryder, 13 Abb. Pr. 1; Kuykendall v. Draper, 19 Hun, 577; Moore v. Boyd, (Cal. 1887) 15 Pac. Rep. 670; Paine v. Stewart, (1882) 33 Conn. 516; Baker v. Bachus, 32 Ill. 99; In re Bank of Sing Sing, (1884) 32 Hun, 462; affirmed 96 N. Y. 672; Terry v. Anderson, (1877) 95

facturing Act prohibits actions against stockholders of corporations formed thereunder, unless they are brought within two years after they cease to be stockholders, it was held that the statute began to run from the time the corporation ceased to do business, its property having been sequestered and a receiver appointed.¹ But where the statute bars such actions three years after an assignment for the benefit of creditors, the mere voluntary dissolution of the corporation or its ceasing to do business does not affect the creditor's right, the statute being limited to cases of insolvency, expiration by limitation or forfeiture.² If debts of the corporation, upon which recovery is otherwise barred by the statute, have been secured by a deed of trust under which the corporate property, including unpaid subscriptions, has been conveyed, equity will give the creditors relief.³ Where the remedy is barred at law, it will be barred in equity also.⁴ Liability of a penal nature is barred in a shorter period than that arising *ex contractu*.⁵

U. S. 628; *Handy v. Draper*, (1882) 89 N. Y. 334; *Merritt v. Reid*, (1882) 13 Week. Dig. (N. Y.) 453; *Longley v. Little*, (1846) 26 Me. 162.

¹ *Hollingshead v. Woodward*, (1887) 107 N. Y. 96.

² *Sleeper v. Goodwin*, 67 Wis. 577.

³ *Hamilton v. Glenn*, (1889) 85 Va. 901.

⁴ *Carrol v. Green*, (1875) 92 U. S. 509; *Lindsay v. Hyatt*, (1842) 4 Edw. Ch. (N. Y.) 104.

⁵ *Lowry v. Inman*, (1871) 46 N. Y. 119; *Patterson v. Baker*, (1867) 34 How. Pr. 180. *Cf.* *Union Iron Co. v. Pierce*, (1869) 4 Biss. 327; *Howell v. Manglesdorf*, (1885) 33 Kan. 194.

CHAPTER XXXVII.

MORTGAGES, BONDS AND COUPONS.

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| <p>§ 738. Introductory.</p> <p>739. Power to mortgage.</p> <p>740. <i>Ultra vires</i> mortgages.</p> <p>741. What amounts to a mortgage.</p> <p>742. Formal requisites.</p> <p>743. In whom the power to mortgage is vested.</p> <p>744. Of the shareholder's consent.</p> <p>745. Priorities.</p> <p>746. Superior liens.</p> <p>747. The same subject continued —
Receivers' certificates.</p> | <p>§ 748. What is covered by a corporate mortgage.</p> <p>749. Whether the mortgage covers fixtures.</p> <p>750. Of future-acquired property.</p> <p>751. Mortgages of income.</p> <p>752. Recording mortgages.</p> <p>753. Mortgage bonds.</p> <p>754. Registration of bonds.</p> <p>755. Bonds convertible into stock.</p> <p>756. Validity of bonds issued below par.</p> <p>757. Coupons.</p> |
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§ 738. **Introductory.**—The power to borrow money implies the power to secure payment thereof by mortgage of the corporate property.¹ But it does not generally imply the power to mortgage its franchises as distinguished from the company's tangible property; nor in any case can a company mortgage the franchise of corporate existence.² The doctrine that a corporation can not mortgage the franchise of corporate existence is not founded upon any technical theory nor arbitrary rule, but upon the reasonable implication that it would be contrary to the intention of the legislature and subversive of the purposes for which the franchise was granted.³ This

¹ *Vide supra*, § 388. But not of the corporate franchise. *Vide supra*, § 389.

² *Vide supra*, § 389.

³ *East Boston &c. R. Co. v. Easton R. Co.*, (1866) 13 Allen, 422; *Commonwealth v. Smith*, 10 Allen, 488; s. c. 87 Am. Dec. 672; *Richardson v. Sibley*, 11 Allen, 65; s. c. 87 Am. Dec. 700; *East Boston &c. R. Co. v. Hubbard*, 10 Allen, 459; *Meyer v.*

Johnston, (1875) 53 Ala. 237; *Louisville &c. R. Co. v. Metcalf*, 4 Met. (Ky.) 199; *Pullan v. Cincinnati &c. R. Co.*, 4 Biss. 35; *Pollard v. Mad-dox*, (1856) 28 Ala. 321; *Dunham v. Isett*, 25 Iowa, 284. But a mortgage of franchises and property may create a valid lien upon the property, although illegal as to the franchises. *Central &c. Mining Co. v. Platt*, 3 Daly, 263.

doctrine is applicable to manufacturing corporations¹ as well as to *quasi* public companies.² The general rule, however, has been doubted in Maine,³ upon the ground that the *personnel* of corporations is a matter of no importance.⁴ And in Wisconsin, under a charter authority to execute such securities as it might deem expedient, a railroad has been held to have the power to mortgage its entire road with all its franchises.⁵

§ 739. Power to mortgage.—The power to mortgage corporate property is co-extensive with the power to alienate it absolutely.⁶ Thus authority given to a company by special act of the legislature to transfer all its property and rights to another corporation confers upon it authority to mortgage its property and rights to the other.⁷ And, generally, a charter conferring the right to acquire, alien, transfer and dispose of property of every kind, confers the power to mortgage.⁸ So

¹ Lord v. Yonkers &c. Co., 99 N. Y. 547.

² Arthur v. Commercial &c. Bank, 11 Miss. 394; State v. Mexican &c. R. Co., 3 Rob. (La.) 513; Black v. Delaware &c. Canal, 22 N. J. Eq. 130; Stewart's Appeal, (1867) 56 Pa. St. 413; Randolph v. Wilmington &c. R. Co., 11 Phila. 502; Hays v. Ottawa &c. R. Co., 61 Ill. 422; Hart v. Eastern Union Ry. Co., 7 Ex. 246; Pullan v. Cincinnati &c. R. Co., (1873) 4 Biss. 35; Carpenter v. Black Hawk &c. Co., 65 N. Y. 43; Troy &c. R. Co. v. Kerr, 17 Barb. 581; New Orleans &c. R. Co. v. Harris, (1854) 27 Miss. 517; Stewart v. Jones, 40 Mo. 140; Daniels v. Hart, 118 Mass. 543; Pierce v. Emery, 32 N. H. 484; Wood v. Bedford &c. R. Co., 8 Phila. 94; Atkinson v. Marietta &c. R. Co., (1864) 15 Ohio St. 21.

³ Kennebec &c. R. Co. v. Portland &c. R. Co., (1871) 59 Me. 9, 23.

⁴ Shepley v. Atlantic &c. R. Co., (1867) 55 Me. 407.

⁵ Pierce v. Milwaukee &c. R. Co., (1869) 24 Wis. 551.

⁶ "The Power of a Railroad Com-

pany to Mortgage its Property and Franchises," (1885) by Leonard A. Jones, 19 Am. L. Rev. 440. It has been held that to confer upon a corporation the power to mortgage its property and franchises, it is not requisite that the words of the statute or of its charter should expressly authorize it so to do if there is by reasonable implication an intention shown by the legislature to authorize it. East Boston &c. R. Co. v. Eastern R. Co., (1866) 13 Allen, 422. The power to mortgage the franchises of a corporation necessarily implies the right to transfer both the franchises and the corporeal property requisite to their exercise to the purchaser at the foreclosure sale. New Orleans &c. R. Co. v. Delamore, (1885) 114 U. S. 501; Galveston &c. R. Co. v. Cowdrey, 11 Wall. 459; Phillips v. Winslow, 18 B. Mon. 431. Cf. Traer v. Clews, 115 U. S. 534.

⁷ East Boston Freight Co. v. Eastern R. Co., 13 Allen, 422.

⁸ McAllister v. Plant, 54 Miss. 106; Commissioners of Craven v. Atlantic &c. R. Co., (1877) 77 N. C. 289; Burr

also, if a corporation, besides being authorized to acquire, purchase, dispose of and convey real and personal property, is empowered to negotiate its paper and to borrow money, it has power to mortgage its property to secure the loans.¹ The power of a trading corporation to mortgage its property as security for money borrowed in the prosecution of its business exists by implication in the absence of charter limitations.² And it may be regarded as well settled that property which a company has not acquired under the right of eminent domain, and which is not requisite to the performance of its duties to the public, may be alienated or mortgaged without legislative authority.³ Authority to mortgage carries with it the right to make the usual conditions, but not those of an extraordi-

v. McDonald, 3 Grat. 215; *Lucas v. Pithey*, (1859) 27 N. J. 221; *Union Bank v. Jacobs*, 6 Humph. 515; *Savannah &c. R. Co. v. Lancaster*, 62 Ala. 555; *Oxford Iron Co. v. Spradley*, 46 Ala. 98; *Booth v. Robinson*, 55 Md. 419; *Thompson v. Lambert*, 44 Iowa, 239; *Ward v. Johnson*, 95 Ill. 215; *Bradley v. Bullard*, 55 Ill. 413; s. c. 7 Am. Rep. 656; *Kent v. Quicksilver Mining Co.*, (1879) 78 N. Y. 159; *Hope &c. Ins. Co. v. Perkins*, 38 N. Y. 404; *Nelson v. Eaton*, 26 N. Y. 410; *Curtis v. Leavitt*, 15 N. Y. 9; *Clark v. Titcomb*, 42 Barb. 122; *Uncas National Bank v. Rith*, 23 Wis. 339; *In re International &c. Soc.*, L. R. 10 Eq. 312; *Australian &c. Co. v. Mounsey*, 4 K. & J. 733; *Bank of Australia v. Breillat*, 6 Moo. P. C. 152, 193; *Kelly v. Alabama &c. R. Co.*, 58 Ala. 489; *Commissioners v. Atlantic &c. R. Co.*, 77 N. C. 289; *Blackburn v. Selma &c. R. Co.*, 2 Flip. 525, where it was held that a railroad corporation, when not restricted by its charter, might acquire lands *ad libitum*, and where it executed a mortgage to secure bonds to be used to raise money for construction purposes, might buy lands with part of the bonds to be utilized by including them in the mortgage as additional security for

all the bonds. A railway company having authority to raise money by the issue of its own bonds, has power to guaranty the bonds of municipal corporations which are issued in its aid to pay debts due it or in which it is interested. *Railroad Co. v. Howard*, (1868) 7 Wall. 392; *Bonner v. City of New Orleans*, 2 Woods, 135; *Rogers Locomotive Works v. Southern R. Assoc.*, 34 Fed. Rep. 278; *Law v. California Pacific R. Co.*, 52 Cal. 53.

¹ *Taylor v. Agricultural & M. Assoc.*, 68 Ala. 229.

² *Wood v. Meyer*, (Miss. 1890) 7 So. Rep. 359.

³ *Farnsworth v. Minnesota &c. R. Co.*, (1875) 92 U. S. 49; *Tucker v. Ferguson*, 22 Wall. 527; *Hendee v. Pickerton*, 14 Allen, 381; *Blackmore v. Yates*, L. R. 2 Ex. 225; *Browne & Theobald's Ry. Law*, 85; *Pickering v. Ilfracombe Ry. Co.*, L. R. 3 C. P. 235; *Gardner v. London &c. Ry. Co.*, 2 Ch. 201. See, however, *Landowners' &c. Co. v. Ashford*, 16 Ch. Div. 411, 437. Under a general power of borrowing and of issuing debentures, debentures issued in discharge of an existing debt are valid. *Inns of Court Hotel Company*, L. R. 6 Eq. 82.

nary or unusual nature.¹ Authority to mortgage the whole corporate property includes the right to mortgage property in whatever way acquired and for debts whenever incurred,² or to mortgage any part of the property.³

§ 740. *Ultra vires* mortgages.—The power of a corporation established for certain specified purposes must depend upon what those purposes are, and except so far as it has express powers given to it, it will have such powers only as are necessary for the purpose of enabling it in a reasonable and proper way to discharge the duties or fulfill the purposes for which it was constituted.⁴ If, however, the objects for which the company is established render it reasonably necessary that it should borrow money and mortgage property therefor, it will have power so to do. Thus, as a rule, no doubt, trading companies would have power to borrow; although in practice the question does not very often arise, as it is usual to insert express power to borrow in the memorandum of association.⁵ The limits and manner of borrowing to which a

¹ *Savannah &c. R. Co. v. Lancaster*, (1878) 62 Ala. 555; *Pacific &c. Co. v. Dayton &c. R. Co.*, 5 Fed. Rep. 852; *Jessup v. City Bank*, 14 Wis. 331; *Hart v. Eastern Union Ry. Co.*, 7 Ex. 246.

² *Galveston &c. R. Co. v. Cowdrey*, 11 Wall. 459.

³ *Pullan v. Cincinnati &c. R. Co.*, (1873) 4 Biss. 35.

⁴ *Regina v. Reed*, L. R. 6 Ch. 87. Accordingly if the borrowing powers of the company are exceeded it is not liable, as persons dealing with it are bound to know that it has not necessarily an unrestricted power of borrowing. *Chapleo v. Brunswick Building Society*, 6 Q. B. Div. 713; *Ashbury &c. Co. v. Riche*, L. R. 7 H. of L. 658, where Lord Selborne said: "I think that contracts for objects and purposes foreign to or inconsistent with the memorandum of association are *ultra vires* of the corporation itself. And it seems to me

far more accurate to say that the inability of such companies to make such contracts rests on an original limitation and circumscription of their powers by the law and for the purposes of their incorporation, than that it depends upon some expressed or implied prohibition making acts unlawful which otherwise they would have had a legal capacity to do."

⁵ *In re Hamilton's &c. Works*, 12 Ch. Div. 707. In the case of *In re Patent File Company*, *Ex parte Birmingham Banking Company*, 6 Ch. App. 87, the following passages occur in the judgments of Lords Justices James and Mellish respectively: "The company is a body corporate, and by the law of England a body corporate can hold property and dispose of it as freely as an individual, unless it is specially prohibited from so doing." . . . "It was urged that no company can mortgage un-

corporation is restricted by its charter or act of incorporation must be strictly observed.¹ Accordingly authority to mortgage for the purpose of carrying on its business does not confer the power to do so for any other purpose.² And the grant to a railway company of the general power to borrow money and to sell bonds at a rate below par, and to execute a mortgage to secure the same, does not authorize it to issue irredeemable bonds at a rate much below par, entitling the holder merely to a contingent share in the profits, nor to execute a mortgage to secure the bonds.³ But a mortgage to secure a debt in excess of the amount limited by the charter has been held not invalid.⁴ So also where a debt of a corporation beyond the limit prescribed by its charter was owned by its directors, and they in good faith took a mortgage on the property of the corporation as security, it was held that they might enforce their security, even though they participated in the management of the corporate business in such a way as to permit the accumulation of the debt beyond the allowed limit, and although the corporation was insolvent when the mortgage was taken, and the mortgage gave them a preference over other creditors.⁵ A contractor who has received debenture stock beyond the amount the company was authorized to issue was held to be entitled to rely upon the implied

less expressly authorized to do so. Now, the company has property which it is authorized to deal with, and I should say that the true rule is just the contrary, namely, that the company can mortgage unless expressly prohibited from doing so. The 43d section of the act appears to recognize the creation of mortgages as an ordinary incident to a company." As observed by Lord Justice Cotton in *Regina v. Reed*, 5 Q. B. Div. 486, that was the case of a trading corporation which may have the power to borrow or to mortgage its property for the purpose of enabling it to carry on its trade.

¹ *Baroness Wenlock v. River Dee Co.*, L. R. 10 App. Cas. 354.

² *Astor v. Westchester Gas Light*

Co., 33 Hun, 333; *Grand Junction R. Co. v. Bickford*, 23 Grant's Ch. (Ont.) 302; *Miller v. New York & C. R. Co.*, 18 How. Pr. 374.

³ *McCalmont v. Philadelphia & C. R. Co.*, (1881) 7 Fed. Rep. 386; s. c. 3 Am. & Eng. R. Cas. 163.

⁴ *Warfield v. Marshall & C. Co.*, (1887) 72 Iowa, 666; s. c. 2 Am. St. Rep. 263; *Garrett v. Burlington Plow Co.*, 70 Iowa, 667; s. c. 59 Am. Rep. 461; *Buell v. Buckingham*, 16 Iowa, 284; s. c. 85 Am. Dec. 516.

⁵ *Garrett v. Burlington Plow Co.*, (1866) 70 Iowa, 697; s. c. 59 Am. Rep. 461, citing *Buell v. Buckingham*, 16 Iowa, 284; *Farmers' & C. Bank v. Wasson*, 48 Iowa, 336; s. c. 30 Am. Rep. 398; *Hallam v. Indianola Hotel Co.*, 56 Iowa, 178.

warranty of the company's authority to issue the stock.¹ Where debenture holders under a statute are entitled *pari passu*, one can not obtain an advantage over the others by means of an additional mortgage.² A corporation is estopped from setting up the defense of *ultra vires* to its mortgage contract when there is nothing on the face of the paper showing that it had exceeded its power.³ And the doctrine of subsequent legislative recognition applies to the making of corporate mortgages as well as to other corporate acts.⁴ The execution of a mortgage which is *ultra vires* on account of being made to secure irredeemable perpetual bonds, may be enjoined at the instance of a stockholder.⁵ But a general creditor of a corporation can not obtain an injunction against its executing a mortgage of its property.⁶

§ 741. What amounts to a mortgage.—In order to create the mortgage lien, no peculiar form of instrument is necessary. Thus a trust deed is in legal effect a mortgage.⁷ And car

¹ Fairbank v. Humphreys, (1886) 18 Q. B. Div. 54.

² De Winton v. Brecon, (1858) 26 Beav. 533.

³ Hays v. Galion &c. Co., (1876) 29 Ohio St. 330; Bissell v. Michigan &c. R. Co., 22 N. Y. 258; Monument Nat. Bank v. Globe Works, 101 Mass. 57; Whitney Arms Co. v. Barlow, 63 N. Y. 62; Singer v. St. Louis &c. Ry. Co., 6 Mo. App. 427.

⁴ White Water &c. Canal Co. v. Vallette, (1858) 21 How. 414; Shaw v. Norfolk County R. Co., 5 Gray, 162; Shepley v. Atlantic &c. R. Co., (1867) 55 Me. 395; Troy &c. R. Co. v. Boston &c. R. Co., 86 N. Y. 107; Richards v. Merrimac &c. R. Co., 44 N. H. 127; Hatcher v. Toledo &c. R. Co., (1871) 63 Ill. 477; Gardner v. London &c. Ry. Co., (1866) L. R. 2 Ch. App. 201; Shrewsbury &c. Ry. Co. v. Northwestern Ry. Co., 6 H. L. 113; East Anglian Ry. Co. v. Eastern Counties Ry. Co., 11 C. B. 775; Winch v. Birkenhead &c. Ry. Co.,

5 De Gex & S. 562; Bagshaw v. Eastern Union Ry. Co., 7 Hare, 114; Northern Ry. Co. v. Eastern Counties Ry. Co., 21 L. J. Ch. 8.

⁵ McCalmont v. Philadelphia &c. R. Co., (1881) 7 Fed. Rep. 386.

⁶ Rogers v. Michigan &c. R. Co., 28 Barb. 539. But the creditors have their remedy against the directors executing an *ultra vires* mortgage. Fairbank v. Humphreys, (1886) 18 Q. B. Div. 54; Chapleo v. Brunswick &c. Soc., 6 Q. B. Div. 696; Richardson v. Williamson, L. R. 6 Q. B. 276; Weeks v. Propert, L. R. 8 C. P. 427. Cf. Rashdell v. Ford, 2 Eq. 750.

⁷ White Water &c. Canal Co. v. Vallette, 21 How. 414; McLane v. Placerville &c. R. Co., 66 Cal. 606; Coe v. McBrown, 22 Ind. 252; Coe v. Johnson, 18 Ind. 218. Trust deeds for securing debentures are not so common as they used to be in England, partly, no doubt, because their advantages are not very

trust agreements for the purchase of rolling stock by instalments regarded as rental only upon forfeiture according to the condition of the contract, are held to constitute mortgages.¹ So also where bonds are expressly made a lien upon the property of the company issuing them, either by statute or stipulation contained in them, a formal mortgage or writing additional to the bonds is unnecessary.² And, if a statute be clear and explicit, in creating a lien of this character,³ it is not necessary that the bonds should make any mention of the statute.⁴ Bonds of this character cover all property,⁵ presently owned or after acquired,⁶ and must be foreclosed to become available, in the manner provided by the statute,⁷ in all respects as a general mortgage lien. But notes given for money borrowed to pay interest on railroad bonds, each of which stipulates that a certain amount of the gross earnings

obvious, and partly because if they include chattels they must comply with the provisions of the Bills of Sale Act 1882, 45 & 46 Vict. ch. 43, on the ground that such a deed is not a debenture within the meaning of sec. 17 of that act. *Brocklehurst v. Railway Printing and Publishing Co.*, Week. Notes 1884, p. 70, and *Ross v. Army & Navy Hotel Co.*, 34 Ch. Div. 53. The fact that the trustees of the deed can enter and execute their powers without resort to an action in the Chancery Division is an advantage more apparent than real, as few trustees would incur the responsibility of putting in force the powers of such deed without the direction of the court. Even when meetings of debenture holders are intended to be held, there seems to be no sufficient reason why provisions for that purpose should not be inserted in the conditions of the debentures themselves, and there are cases in which that has been done. "Debentures," reprinted from the *Law Times*, London, (1890) 8 Ry. & Corp. L. J. 518.

¹ *Heryford v. Davis*, (1880) 102

U. S. 235; *Hervey v. Rhode Island &c. Works*, 93 U. S. 664; *Frank v. Denver &c. Ry. Co.*, 23 Fed. Rep. 123. Cf. *Fosdick v. Schall*, (1878) 99 U. S. 235, 251; and on Car Trust Securities generally see paper by Francis Rawle, 8 Am. Bar Assoc. Rep. 277; *Yorkshire Ry. Wagon Co. v. Maclure*, 21 Ch. Div. 309; *North Central Wagon Co. v. Manchester &c. Ry. Co.*, 35 Ch. Div. 191.

² *White Water &c. Canal Co. v. Vallette*, (1858) 21 How. 414; *Ketchum v. Pacific R. Co.*, 4 Dill. 78, 86; *Wilson v. Boyce*, 92 U. S. 320; *Woodson v. Murdock*, 22 Wall. 351; *Murdock v. Woodson*, 2 Dill. 539; *Miller v. Rutland &c. R. Co.* (1863) 36 Vt. 452; *State v. Florida &c. R. Co.*, 15 Fla. 690.

³ *Cincinnati v. Morgan*, (1865) 3 Wall. 275; *Brunswick &c. R. Co. v. Hughes*, 52 Ga. 557; *Collins v. Central Bank*, 1 Kelly, 435.

⁴ *Dundas v. Desjardins*, 17 Grant, (U. C.) 27.

⁵ *Wilson v. Boyce*, 92 U. S. 320.

⁶ *Whitehead v. Vineyard*, 50 Mo. 30.

⁷ *Florida v. Anderson*, 91 U. S.

667.

of the road from date "is pledged in liquidation of this note," are not thereby given priority over the bonded debt, as the stipulation is ineffectual.¹ And a contract between two railroad companies in relation to the carriage of freights and division of earnings, which provides that this "contract, and any damages for the breach of the same, shall be a continuing lien upon the roads of the two contracting companies, their equipment and income, in whosoever hands they may come," does not constitute a lien or obligation running with the land, so as to render it liable in the hands of a purchaser of one of the roads for supposed earnings that would have accrued during the term provided in the lease.²

§ 742. **Formal requisites of mortgages.**—Corporate mortgages under the authority of a vote of the board of directors are usually required to be signed by the president and countersigned by the secretary or treasurer, and sealed with the corporate seal.³ Thus a mortgage signed by the president, secretary and two stockholders, and duly witnessed, but not sealed with the common seal of the corporation as required by the statute, is ineffectual.⁴ The mortgage and the bonds may be validly executed out of the State in which the company's property is situated;⁵ although with respect to the forms of conveyance, a mortgage of realty should be executed according to the law of the State where it lies.⁶ The law of the State creating the corporation governs as to the authority of the corporate agents to act.⁷ The mortgage deed should

¹ *McIlhenny v. Binz*, (Tex. 1890) 13 S. W. Rep. 655.

² *Des Moines & Ft. D. R. Co. v. Wabash, St. L. & P. R. Co.*, (1890) 135 U. S. 576; s. c. 8 Ry. & Corp. L. J. 84.

³ *Galveston &c. R. Co. v. Cowdrey*, (1870) 11 Wall. 459; *Duke v. Markham*, (1890) 105 N. C. 131; *Ohio &c. R. Co. v. McPherson*, 35 Mo. 13; s. c. 86 Am. Dec. 128; *Wright v. Bundy*, 11 Ind. 398; *Arms v. Conant*, 36 Vt. 744; *McCurdy's Appeal*, 65 Pa. St. 290; 8 Vic. ch. 16, § 41; *Londoners &c. Co. v. Ashford*, 16 Ch. Div. 411;

In re Bagnalstown &c. Ry. Co., Ir. Rep. 4 Eq. 505.

⁴ *Duke v. Markham*, (1890) 105 N. C. 131.

⁵ *Hervey v. Illinois Midland Ry. Co.*, 28 Fed. Rep. 169; *Hadder v. Kentucky &c. R. Co.*, 7 Fed. Rep. 793.

⁶ *Saltmarsh v. Spaulding*, (1888) 147 Mass. 224.

⁷ *Saltmarsh v. Spaulding*, (1888) 147 Mass. 224, where a statute in Massachusetts prohibiting directors from mortgaging the corporate property without authority from the stockholders, was held not to apply

describe specifically and accurately the bonds which it is given to secure.¹ But a mortgage given by a railroad company to secure the payment of dividends to the holders of certificates purporting to be certificates of preferred stock, is an incident to the principal obligation; and the terms and purport of the certificates express the real intent of the parties, even though some of the stipulations of the mortgage may be apparently inconsistent with the intent as expressed by the certificates.² A mortgage deed may be reformed by a court of equity, so as to carry out the evident intent of the parties.³ And a defective mortgage which could not operate as a deed has been held to be an equitable mortgage, taking precedence over second mortgages affected with notice of the former.⁴

§ 743. In whom the power to mortgage is vested.—While as a general rule the extraordinary powers of a corporation are reserved to the members at large and are not to be exercised by the directors, unless delegated to them by the members,⁵ and while this rule is, and as it would seem appropriately, applied to the power to mortgage, by the statutes of several States and the charters of many companies,⁶ yet in the absence of any provision in the statutes or charter, it is held that the powers of a company herein may be exercised by the direct-

to a mortgage of property situated in Massachusetts, owned by a corporation deriving its charter from Vermont.

¹ *Butler v. Rahm*, 46 Md. 541.

² *Miller v. Ratterman*, (Ohio, 1890) 24 N. E. Rep. 496.

³ *Coe v. New Jersey &c. R. Co.* (1879) 31 N. J. Eq. 105; *Randolph v. New Jersey &c. R. Co.*, 28 N. J. Eq. 49.

⁴ *Miller v. Rutland &c. R. Co.*, (1863) 36 Vt. 452.

⁵ *Vide supra*, § 73.

⁶ 8 Vic. ch. 16, § 38; Mass. Pub. Stat. ch. 106, § 23; Tex. Rev. Stat. § 4220, as to railways. The provision of the English act is held to be directory only, and does not invali-

date securities issued without the authority of a general meeting, even in the hands of the original allottee, if he has no notice of any irregularity. *In re Romford Canal*, 24 Ch. Div. 85; *Landowners' &c. Co. v. Ashford*, 16 Ch. Div. 411; *Fontaine v. Carmathen Ry. Co.*, 5 Eq. 316. The statute giving church trustees authority, under the direction of the society, to mortgage real estate, does not require a two-thirds vote, as in the case of a sale or conveyance. *Scott v. Jackson Methodist Church*, 50 Mich. 528. These statutes are not applicable, however, to foreign corporations. *Saltmarsh v. Spaulding*, (1888) 142 Mass. 224; s. c. 4 Ry. & Corp. L. J. 151.

ors.¹ Thus the directors of a gas-light corporation organized under the New York laws relating to the organization of such companies, may execute a mortgage to secure a debt without the written consent of two-thirds of its stockholders.² A committee of the board of directors, whether especially authorized or not, may also be empowered by the board to negotiate loans and execute the company's mortgage therefor.³ But directors can not make a mortgage to themselves,⁴ nor thereby secure themselves an advantage over other creditors.⁵

§ 744. Of the shareholder's consent.—Under an act authorizing manufacturing corporations to mortgage their property upon obtaining the assent of the owners of two-thirds of the stock, the assent of the corporation in behalf of shares owned by it, can not be considered in making up the two-thirds.⁶ Where the assent of a majority of the stockholders

¹ *Australian &c. Co. v. Mounsey*, (1858) 4 Kay & J. 733; *Taylor v. Agricultural &c. Assoc.* (1890) 68 Ala. 229; *Burrill v. Nahant Bank*, (1840) 2 Met. 163; s. c. 35 Am. Dec. 395; *Hendee v. Pinkerton*, 14 Allen, 381; *Tripp v. Swanzy Paper Co.*, 13 Pick. 291; *Wood v. Whelen*, (1879) 93 Ill. 153.

² *Davidson v. Westchester Gas-Light Co.*, 99 N. Y. 558, construing the act of 1872, which omits that provision contained in the act of 1848.

³ *Taylor v. Agricultural &c. Assoc.* (1880) 68 Ala. 229; *Burrill v. Nahant Bank*, (1840) 2 Met. 162.

⁴ *Haywood v. Lincoln Lumber Co.*, (1885) 64 Wis. 639; citing *Corbett v. Woodward*, 5 Sawyer, 403; *Koehler v. Black River &c. Co.*, 2 Black, 715; *Hoyle v. Plattsburg &c. R. Co.*, (1873) 54 N. Y. 314; s. c. 13 Am. Rep. 595; *Butts v. Wood*, 38 Barb. 188; *Cumberland &c. Co. v. Sherman*, 30 Barb. 553; *Scott v. De Peyster*, 1 Edw. Ch. 513; *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. 85;

European &c. R. Co. v. Poor, 59 Me. 277; *Cook v. Berlin &c. Co.*, 43 Wis. 434; *In re Taylor Orphan Asylum*, 36 Wis. 552; *Pickett v. School District*, 25 Wis. 553; *Walworth Co. Bank v. Farmers' &c. Co.*, 16 Wis. 629; *Great Luxemburgh Ry. Co. v. Magnay*, 25 Beav. 586. See *contra*, *Warfield v. Marshall &c. Co.*, (1887) 72 Iowa, 663; s. c. 2 Am. St. Rep. 461.

⁵ *Haywood v. Lincoln Lumber Co.*, (1885) 64 Wis. 639; *Curran v. Arkansas*, 15 How. 306; *Drury v. Cross*, 7 Wall. 299; *Bradley v. Farwell*, 1 Holmes, 433; *Marr v. Bank of Tennessee*, (1867) 4 Coldw. 471, 484; *Richards v. New Hampshire Ins. Co.*, 43 N. H. 263; *Paine v. Lake Erie &c. Co.*, (1869) 31 Ind. 353; *Gas-Light Co. v. Terrell*, L. R. 10 Eq. Cas. 168.

⁶ But shares transferred by the corporation as collateral security for a debt can not be so deducted, although the assignment be absolute on its face. *Vail v. Hamilton*, 85 N. Y. 453.

is necessary, it can not be expressed separately and privately to a person who goes around among them, nor in any other way than at a meeting of the stockholders.¹ The corporators and no one else can raise objections to proceedings under acts restricting the power of the directors to mortgage.² And even the shareholders will be estopped from pleading their non-consent when a mortgage has been executed and issued by the directors and the company has received the proceeds thereof.³ If the borrowing powers of the directors only, as distinguished from those of the company, are exceeded, the company can ratify the transaction, and that without altering its articles of association.⁴

§ 745. **Priorities.**—As a mortgagee can obtain no higher right than the mortgagor possesses,⁵ the mortgagees of a company which sells its property to another,⁶ or of a company which is consolidated with another, have a lien upon the property superior to that of the mortgagees of the purchaser or company with which the consolidation is effected.⁷ The latter take the property *cum onere*.⁸ The lien of the bonds of one

¹ *Duke v. Markham*, (1890) 105 N. C. 131.

² *Thomas v. Citizens' &c. R. Co.*, (1882) 104 Ill. 462; *Beecher v. Marquette &c. Co.*, 45 Mich. 103; *Hervey v. Illinois Midland Ry. Co.*, 28 Fed. Rep. 169.

³ *Hadder v. Kentucky &c. R. Co.*, 7 Fed. Rep. 793; *Texas &c. Ry. Co. v. Gentry*, (1888) 69 Tex. 625; *McCurdy's Appeal*, 65 Pa. St. 290. *Contra*, where the bonds were in the hands of holders with notice. *City of Chicago v. Cameron*, (1887) 120 Ill. 447.

⁴ *Irvine v. Union Bank of Australia*, 2 App. Cas. 366; *Grant v. United Kingdom Switchback Railway Company*, 40 Ch. Div. 185.

⁵ *Robson v. Michigan &c. R. Co.*, 37 Mich. 70; *Washington &c. R. Co. v. Lewis*, 83 Va. 246; *Chicago &c. R. Co. v. Loewenthal*, (1879) 93 Ill. 433; *Haven v. Emery*, 83 N. H. 66; *Williamson v. New Jersey &c. R.*

Co., 29 N. J. Eq. 311; *Williamson v. New Jersey &c. R. Co.*, 28 N. J. Eq. 277. *Cf. Barnes v. Chicago &c. Ry. Co.*, 122 U. S. 1; *Wabash &c. R. Co. v. Ham*, 114 U. S. 595; *Chicago &c. R. Co. v. Howard*, 7 Wall. 392; *Pittsburgh &c. R. Co. v. Indianapolis &c. R. Co.*, 8 Biss. 456.

⁶ *Branch v. Atlantic &c. R. Co.*, 3 Woods, 481.

⁷ *Rutten v. Union Pacific R. Co.*, 17 Fed. Rep. 480; *Gale v. Troy &c. R. Co.*, (1888) 2 N. Y. Supl. 354; *Polhemus v. Fitchburg R. Co.*, (1888) 50 Hun, 397; s. c. 5 Ry. & Corp. L. J. 212; *Hamlin v. Jerrard*, 72 Me. 62. *Cf. Gilbert v. Washington &c. R. Co.*, 33 Grat. 556.

⁸ *Chicago, K. & W. R. Co. v. Putnam*, (1887) 36 Kan. 121; *Fosdick v. Schall*, (1878) 99 U. S. 235, 251, citing *United States v. New Orleans R. Co.*, 12 Wall. 362. *Acc. Fosdick v. Car Co.*, 99 U. S. 256:

company will not be enlarged or perfected by the consolidation of that company with others.¹ But a mortgage on the property of an old railroad corporation, given by the successor to its property and franchises, is entitled to priority over the claim of a creditor for services and advances to the former, who did not obtain a judgment against either corporation until some years after the mortgage was given, and the nature of whose services and advances does not entitle him to a statutory lien on the corporate property.² The provisions of a statute that mortgages executed by corporations upon their property or earnings shall not exempt the property or earnings from execution for the satisfaction of a judgment obtained for labor or materials, do not contemplate a lien for materials furnished from abroad, where its personal credit alone was relied on and a negotiable security taken.³ A statutory proviso that all debts and contracts of any corporation, prior to the execution of any mortgage by it, shall have a first lien upon its property and franchises and shall be paid off or secured before the mortgage shall be registered, is not to be limited to corporations formed by purchasers under a deed of trust or mortgage made by an insolvent or expiring corporation, but extends to corporations generally, however brought into existence. Hence where a corporation executes a mortgage to secure bonds issued for the purpose of raising money, its debts, existing at the time of the execution of the mortgage, have priority over the bonds.⁴ The purpose of a receivership being to preserve the property contested for, *pendente lite*, it has no effect, of itself, upon the title to the property, either to change it or to create a lien upon it.⁵ But a mortgagee acquires a specific lien upon the

Hall v. Frost, 99 U. S. 389; Huidekoper v. Locomotive Works, 99 U. S. 258; Rogers Locomotive Works v. Lewis, 4 Dill. 158. See Coe v. New Jersey Midland R. Co., 31 N. J. Eq. 105.

¹ Wabash & c. Ry. Co. v. Ham, 114 U. S. 587.

² Fogg v. Blair, (1890) 133 U. S. 534.

³ Traders' Nat. Bank v. Lawrence

Manuf. Co., (1887) 96 N. C. 298, construing N. C. Code, § 1255.

⁴ Traders' Nat. Bank v. Lawrence Manuf. Co., 96 N. C. 298, construing Battle's Revisal, ch. 26, § 48.

⁵ Harman v. McMullin, 4 Ry. & Corp. L. J. 515; Ellis v. Boston, Hartford & E. Ry. Co., 107 Mass. 1; *Ex parte Dunn*, 8 S.-C. 207; *In re Colvin*, 3 Md. Ch. Dec. 278; *Beverley v. Brooke*, 4 Gratt. 211; *Skip v.*

rents by obtaining the appointment of a receiver of them, and if he be a second or third incumbrancer, the court will give him the benefit of his superior diligence over his senior in respect to the rents which accrued during the time that the elder mortgagee took no measures to have the receivership extended to his suit and for his benefit.¹ It is sometimes necessary to appoint a receiver of property where the interests of the parties to the suit are so connected with those of third persons that the necessary possession of the officer of the court conflicts with the legal rights of the latter. But the court will refuse to divest a previous possession of third persons unnecessarily.²

§ 746. Superior liens.—Debts incurred in operating concerns in whose continued operation the public has an interest are a charge upon their property superior to all mortgage liens.³ Accordingly claims for current expenses in

Harwood, 3 Atkins, 564; Huguenin v. Baseley, 13 Ves. 105; Cooke v. Gwyn, 3 Atk. 689; Ellicott v. Warford, 4 Md. 80; Blakeney v. Dufaur, 15 Beav. 40; Leavitt v. Yates, 4 Edw. Ch. 162; Brown v. Northrup, 15 Abb. Pr. (N. S.) 333; *Ex parte* Walker, 25 Ala. 104; Bitting v. Ten Eyck, 85 Ind. 357; Ellicott v. United States Ins. Co., 7 Gill, 307; Pittsburgh &c. R. Co. v. Indianapolis &c. R. Co., 8 Biss. 456; Beach on Receivers, § 1.

¹ Beach on Railways, § 715, citing Port v. Dorr, 4 Edw. Ch. 412; Howell v. Ripley, 10 Paige, 43; Washington Life Ins. Co. v. Fleischauer, 10 Hun, 117; Ranney v. Peyser, 83 N. Y. 1; Sanders v. Lisle, Ir. R. 4 Eq. 43; Agra & Masterman's Bank v. Barry, Ir. R. 3 Eq. 443; Lanauze v. Belfast, Holywood & Bangor Ry. Co., Ir. R. 3 Eq. 454; Miltenberger v. Logansport R. Co., 106 U. S. 286.

² Chancellor Walworth in Vincent v. Parker, 7 Paige, 65; Howell v. Ripley, 10 Paige, 43; Brooks v. Great-

head, 1 Jac. & W. 176; Brien v. Paul, 3 Tenn. Ch. 357; Skinner v. Maxwell, 68 N. C. 400; Angel v. Smith, 9 Ves. 335. *Cf.* Riggs v. Whitney, 15 Abb. Pr. 388; Beach on Receivers, § 6.

³ Calhoun v. St. Louis &c. R. Co., 14 Fed. Rep. 9; Galveston &c. R. Co. v. Cowdrey, 11 Wall. 459, 483. And every railroad mortgagee, in accepting his security, is deemed by legal implication to agree that the current debts made in the ordinary course of business shall be paid from the current receipts before he shall have any claim upon the income. Fosdick v. Schall, (1878) 99 U. S. 235, 252; Burnham v. Bowen, (1884) 111 U. S. 776, 783; Huidekoper v. Locomotive Works, (1878) 99 U. S. 258, 260; Hale v. Frost, 99 U. S. 389; American Bridge Co. v. Heidelberg, 94 U. S. 798; Gilman v. Illinois &c. Telegraph Co., 91 U. S. 603; Schutte v. Florida R. Co., 3 Woods, 692, 712; Turner v. Indianapolis &c. R. Co., 8 Biss. 315; Williamson v. Washington City &c.

operating a railroad for a reasonable time, usually six months before the receivership, are payable by the receiver.¹ And the debts incurred by the receiver in operating the road are of course payable before the mortgage debt.² But these expenses must be paid out of the income of the property while

R. Co., 33 Grat. 624; Union Trust Co. v. Illinois &c. R. Co., 117 U. S. 434; St. Louis &c. R. Co. v. Cleveland &c. Ry. Co., (1888) 125 U. S. 658; Central Trust Co. v. Texas &c. Ry. Co., 27 Fed. Rep. 178; Union Trust Co. v. Soutter, 107 U. S. 591; Farmers' Loan & Trust Co. v. Vicksburg &c. R. Co., 33 Fed. Rep. 778; Blair v. St. Louis &c. R. Co., 22 Fed. Rep. 471; s. c. 23 Fed. Rep. 521; s. c. 33 Fed. Rep. 778; Langdon v. Vermont &c. R. Co., 54 Vt. 593.

¹ Turner v. Indianapolis &c. R. Co., 8 Biss. 315; Beach on Receivers, § 369; Duncan v. Mobile &c. R. Co., 2 Woods, 542; Brown v. New York &c. Ry. Co., 19 How. Pr. 84; Huidekoper v. Locomotive Works, 99 U. S. 258; Douglas v. Cline, 12 Bush, 608; Skiddy v. Atlantic &c. R. Co., 3 Hughes, 320; Union Trust Co. v. Walker, 107 U. S. 596; Williamson v. Washington City &c. R. Co., 33 Grat. 624; Central Trust Co. v. Texas &c. Ry., 22 Fed. Rep. 135; Atkins v. Petersburg R. Co., 3 Hughes, 307. Money due upon contracts entered into by a railroad corporation before the appointment of receivers, and which does not constitute a lien upon the property of the company, is part of the general indebtedness of the road, and although binding upon it, is not to be paid by the receiver. Such a payment would clearly be giving a preference to creditors of equal right and would defeat the object of foreclosure. Ellis v. Boston, H. & E. R. Co., 107 Mass. 1; s. c. *sub nom.*, Graham v. Boston, H. & E. R. Co.,

118 U. S. 161, holding, however, that the contracts may be carried out by the receivers if necessary or if clearly beneficial to the trust. An order of appointment authorizing a receiver to pay amounts due and maturing, for materials and supplies for the operation of the road, is construed to refer to the payment of such obligations as are necessary to preserve the line in good running condition; and the court will refuse to direct its receiver to pay obligations which had been incurred long before his appointment, considering the rights of the mortgagees of primary importance as contrasted with them. Brown v. New York &c. R. Co., 19 How. Pr. 84; Beach on Receivers, § 363.

² Wallace v. Loomis, 97 U. S. 146; Miltenberger v. Logansport R. Co., 106 U. S. 286; Taylor v. Philadelphia &c. R. Co., 7 Fed. Rep. 377; Atkins v. Petersburg R. Co., 3 Hughes, 307; Beach on Receivers, § 367; Dennistoun v. Chicago &c. R. Co., 4 Biss. 414; Union Trust Co. v. Illinois Midland R. Co., (1886) 117 U. S. 434; Duncan v. Trustees of Chesapeake &c. R. Co., 9 Am. Ry. Rep. 386; Metropolitan Trust Co. v. Tonawanda &c. R. Co., 103 N. Y. 245; Union Trust Co. v. Soutter, 107 U. S. 591; Douglas v. Cline, 12 Bush, 608; Fosdick v. Schall, 99 U. S. 235; Burnham v. Bower, (1884) 111 U. S. 776; Union Trust Co. v. Walker, 107 U. S. 596; Skiddy v. Atlantic &c. Ry. Co., 3 Hughes, 320; Central Trust Co. v. Wabash &c. R. Co., 25 Fed. Rep. 69.

in the receiver's hands,¹ and can only be made a charge upon the body of the property by express order of the court.² Again statutory liens for labor and materials outrank the mortgage lien.³ If current earnings are used for the benefit of mortgage creditors before the current expenses are paid, the mortgage security is chargeable with its restoration.⁴ Debts due the State may be a superior lien,⁵ and vendors' liens have the priority they would have in the case of natural persons.⁶ Judgment creditors are entitled to be paid out of the funds according to the nature of their claims, not by virtue of reducing them to judgment.⁷ Persons making advance-

¹ *Schutte v. Florida R. Co.*, 3 Woods, 692, 712; *Beach on Receivers*, § 376; *Hale v. Frost*, (1878) 99 U. S. 389; *Miltenerberger v. Logansport R. Co.*, 106 U. S. 286.

² *Hand v. Savannah &c. R. Co.*, (1879) 17 S. C. 219; *Blair v. St. Louis &c. R. Co.*, 22 Fed. Rep. 471; *Beach on Receivers*, § 377; *Vermont &c. R. Co. v. Vermont Central R. Co.*, 50 Vt. 500; *Wallace v. Loomis*, 97 U. S. 146; *Miltenerberger v. Logansport R. Co.*, 106 U. S. 286; *Kennedy v. St. Paul &c. R. Co.*, 2 Dill. 448; s. c. 5 Dill. 519; *Duncan v. Trustees of Chesapeake &c. R. Co.*, 9 Am. Ry. Rep. 386; *Union Trust Co. v. Illinois Midland R. Co.*, (1885) 117 U. S. 434; *Metropolitan Trust Co. v. Tonawanda Valley &c. R. Co.*, (1886) 103 N. Y. 245; *Blair v. St. Louis &c. R. Co.*, 22 Fed. Rep. 471; *Hale v. Nashua &c. R. Co.*, 60 N. H. 333; *McLane v. Placerville &c. R. Co.*, 66 Cal. 606.

³ *Poland v. Lamoille Valley R. Co.*, 52 Vt. 144; *Blair v. St. Louis &c. R. Co.*, 25 Fed. Rep. 232; s. c. 19 Fed. Rep. 861; *Traders' National Bank v. Lawrence Manuf. Co.*, 96 N. C. 298; *Receivers &c. v. Mortendyke*, 27 N. J. Eq. 658. Salaries of officers of a railroad company are not classed as wages to employees and have been refused preference. *Addison v. Lewis*, 75 Va. 701. The matter of

priority of counsel fees for services rendered before the receivership was considered in *Bayliss v. Lafayette &c. R. Co.*, 9 Biss. 90.

⁴ *St. Louis &c. R. Co. v. Cleveland Ry. Co.*, 125 U. S. 658, 673; *Union Trust Co. v. Morrison*, 125 U. S. 591, 612; *Sage v. Memphis &c. R. Co.*, 125 U. S. 361; *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434; *Burnham v. Bowen*, (1884) 111 U. S. 776, 783; *Union Trust Co. v. Soutter*, 107 U. S. 591; *Miltenerberger v. Logansport Ry. Co.*, 106 U. S. 286; *Fosdick v. Schall*, (1878) 99 U. S. 235; *Menasha v. Milwaukee &c. R. Co.*, 52 Wis. 414; *Duncan v. Mobile &c. R. Co.*, 2 Woods, 542; *Hale v. Burlington &c. R. Co.*, 1 McCrary, 58.

⁵ *Ralston v. Crittenden*, 3 McCrary, 332. But see *Brown v. State*, 62 Md. 439.

⁶ *Florida v. Anderson*, (1875) 91 U. S. 667; *Anderson v. Pensacola R. Co.*, 2 Woods, 628; *Carpenter v. Black Hawk &c. Co.*, 65 N. Y. 43; *Fisk v. Potter*, 2 Abb. App. Dec. 138; *Texas &c. Ry. Co. v. Gentry*, (1888) 69 Tex. 625; *Pierce v. Milwaukee &c. R. Co.*, 24 Wis. 551; s. c. 1 Am. Rep. 203.

⁷ *Gibert v. Washington City &c. R. Co.*, 2 Woods, 519; *Turner v. Indianapolis &c. R. Co.*, 8 Biss. 527; *Legg v. Matthieson*, 2 Giff. 71; *Gardner v.*

ments to pay preferred claims do not thereby obtain the right of subrogation to the lien the debts enjoyed in the hands of the original debtor.¹

§ 747. The same subject continued—**Receivers' certificates.**—If there are no current funds on hand, the receiver may be authorized by the court to procure credit and issue vouchers or acknowledgments of indebtedness known as "receivers' certificates," for the purpose of preserving the property from destruction or serious injury.² The theory of the

London &c. Ry. Co., L. R. 2 Ch. App. 201. Except, of course, where they have done so before the mortgage was executed. *Bergen v. Porpoise &c. Co.*, 41 N. J. Eq. 238.

¹ *Penn v. Calhoun*, (1887) 121 U. S. 521; *Fosdick v. Schall*, 99 U. S. 255; *Memphis &c. R. Co. v. Don*, 124 U. S. 652; *Blair v. St. Louis &c. Ry. Co.*, 23 Fed. Rep. 521; *Farmers' &c. Co. v. Vicksburg &c. R. Co.*, 33 Fed. Rep. 778; *Kelly v. Green Bay &c. R. Co.*, 10 Biss. 151; *Receivers of New Jersey Midland R. Co. v. Wortendyke*, 27 N. J. Eq. 658; *Cairo &c. R. Co. v. Fackney*, 78 Ill. 116. But see *Farmers' Loan & Trust Co. v. Vicksburg &c. R. Co.*, 33 Fed. Rep. 778.

² *Swan v. Clark*, 110 U. S. 602; *Barton v. Barbour*, 104 U. S. 126; *Shaw v. Railroad Co.*, 100 U. S. 605, 612; *Wallace v. Loomis*, 97 U. S. 146, 162; *Jerome v. McCarter*, 94 U. S. 734; *Cowdry v. Galveston &c. R. Co.*, 1 Woods, 331; *Investment Co. v. Ohio &c. R. Co.*, 36 Fed. Rep. 48; *Union Trust Co. v. Chicago &c. R. Co.*, 7 Fed. Rep. 513; *Meyer v. Johnson*, 53 Ala. 237, 348; *Turner v. Peoria &c. R. Co.*, 95 Ill. 134; *Bank of Montreal v. Chicago &c. R. Co.*, 48 Iowa, 518; *Jones on Railroad Securities*, § 533; *High on Receivers*, (2d ed.) § 398, d; "The Doctrine of Receivers' Certificates," by R. F. Stevens, Jr., 23 Cent. L. J. 340. As

to the necessity which justifies the court in authorizing receivers' certificates to be issued, see: *Meyer v. Johnson*, 53 Ala. 237; *Wallace v. Loomis*, 97 U. S. 146, 162; *Hoover v. Montclair &c. R. Co.*, 29 N. J. Eq. 4; *Metropolitan Trust Co. v. Tonawanda Valley &c. R. Co.*, 103 N. Y. 245; *Vermont &c. R. Co. v. Vermont Central R. Co.*, 50 Vt. 500, 569; *Swann v. Clark*, 110 U. S. 602; *Vilas v. Page*, 106 N. Y. 439, 451, 452; *In re Philadelphia &c. R. Co.*, 14 Phila. 501; *Humphrey v. Allen*, 101 Ill. 490; *Taylor v. Philadelphia &c. R. Co.*, 7 Fed. Rep. 377; *Union Trust Co. v. Illinois Midland R. Co.*, 117 U. S. 434; *Stanton v. Alabama &c. R. Co.*, 2 Woods, 506; *Credit Co. (Limited) v. Arkansas Central R. Co.*, 15 Fed. Rep. 46; *Barton v. Barbour*, 104 U. S. 126; *Coe v. New Jersey Midland R. Co.*, 27 N. J. Eq. 37; *Turner v. Peoria &c. R. Co.*, 95 Ill. 134; s. c. 35 Am. Rep. 144; these cases holding that the court may authorize their issue to meet operating expenses, to buy machinery, rolling-stock and supplies, to maintain the roadway in safe repair and to pay the rent of rolling-stock. It has even been held that under some circumstances an unfinished line of railway may be completed and paid for by means of receivers' certificates. *Kennedy v. St. Paul &c. R. Co.*, 2 Dill.

matter is that the expenditure is necessary to preserve the property; the mortgagee assents to the expenditure; the court orders it to be made; it is, therefore, properly a lien prior to the mortgage, and must be paid first. These facts, or some others equivalent thereto, and the order of the court declaring the lien, are usually recited in the body of the certificate itself. The power of a court of equity to authorize the issue of certificates by the receiver, and to make them a first lien upon the property, payable before the first mortgage bonds, is not questioned in any of the cases in our State or federal reports. It has been expressly upheld in many leading cases.¹

448; s. c. 5 Dill. 519; *Bank of Montreal v. Chicago &c. R. Co.*, 48 Iowa, 518. *Acc. Gibert v. Washington &c. R. Co.*, 33 Gratt. 586, 645. *Acc. Jerome v. McCarter*, 94 U. S. 734, 738 (a canal case). But see *Shaw v. Railroad Co.*, 100 U. S. 605; *Hand v. Railway Co.*, 10 S. C. 406; s. c. *sub nom.* *Hand v. Savannah &c. R. Co.*, 17 S. C. 219; *Credit Co. v. Arkansas Central R. Co.*, 15 Fed. Rep. 46; *Vermont &c. R. Co. v. Vermont Central R. Co.*, 50 Vt. 500, 569; s. c. 46 Vt. 792; *Secor v. Toledo, Peoria & Warsaw R. Co.*, 7 Biss. 513. There is to be found some authority for the rule that a receiver may be allowed to issue certificates in payment for labor, materials, supplies and taxes upon the property due prior to his appointment. *Humphreys v. Allen*, 101 Ill. 490; *Taylor v. Philadelphia &c. R. Co.*, 7 Fed. Rep. 377. But in New York it is held that a court has no power to authorize a receiver to pay, or to issue his certificates of indebtedness in payment for labor and services in operating the road prior to his receivership, and to make the certificates so issued a lien prior to the mortgage. *Metropolitan Trust Co. v. Tonawanda Valley &c. R. Co.*, 103 N. Y. 245; s. c. 1 Ry. & Corp. L. J. 65; reversing s. c. 40 Hun, 80; *Raht v. Attrill*, 42 Hun, 414, 418; s. c.

106 N. Y. 423; s. c. 60 Am. Rep. 456; citing *Burnham v. Bowen*, 111 U. S. 776, 782; *Beach on Receivers*, § 388.

¹ *Beach on Receivers*, § 392, citing *Stanton v. Alabama &c. R. Co.*, 2 Woods, 506; *Hoover v. Montclair & Greenwood Lake R. Co.*, 29 N. J. Eq. 4; *Meyer v. Johnson*, 53 Ala. 237, 350; *Kennedy v. St. Paul & Pacific R. Co.*, 2 Dill. 448; s. c. 5 Dill. 519; *Bank of Montreal v. Chicago, C. & W. R. Co.*, 48 Iowa, 518; *Taylor v. Philadelphia & Reading R. Co.*, 7 Fed. Rep. 377; *Jerome v. McCarter*, 94 U. S. 734; *Cowdrey v. Railroad Co.*, 1 Woods, 331; *Vermont & Canada R. Co. v. Vermont Central R. Co.*, 49 Vt. 792; s. c. 50 Vt. 500, 569, *Credit Co. v. Arkansas Central R. Co.*, 15 Fed. Rep. 46; s. c. 23 Am. Law Reg. (N. S.) 35, and see the note thereto by Mr. Adelbert Hamilton; *Wallace v. Loomis*, 97 U. S. 146, 162; *Miltenberger v. Logansport R. Co.*, 106 U. S. 286, 309; *Union Trust Co. v. Illinois Midland R. Co.*, 117 U. S. 434, 451, 454; *Dunham v. Cincinnati &c. R. Co.*, 1 Wall. 254; *Huidekoper v. Locomotive Works*, 99 U. S. 258; *Denniston v. Chicago &c. R. Co.*, 4 Biss. 414; *Duncan v. Mobile & Ohio R. Co.*, 2 Woods, 542; *Brown v. Erie Ry. Co.*, 19 How. Pr. 84; *Vatable v. New York &c. R. Co.*, 96 N. Y. 49; *Turner v. Indianapolis &c. R.*

§ 748. What is covered by a corporate mortgage.—The statute under which a corporate mortgage is made, with the intention of the parties to the deed, determine what property is covered thereby.¹ The franchise of being a corporation, however, is not included in a mortgage of the property and franchise of a company, unless by positive provision of law.² And in general, while the mortgage is to be construed with reference to the statute, the words of description in the deed will not be extended beyond those in the enabling act.³ Specific descriptions and enumerations are construed to be exclusive.⁴ But if the statute confer the power to mortgage all the corporate property, general terms unrestricted in the deed will cover the whole property of the corporation.⁵ General terms, however, when connected with or allied in meaning to phrases most aptly describing property in use by the corporation or necessary to its business, will not pass property, especially land, which is not connected with its regular and legitimate operations.⁶ And a mortgage of "all the property" does not embrace *choses in action* unless specifically mentioned.⁷ So, also, the word "undertaking," found in English mortgages, has a meaning entirely restricted to the going con-

Co., 8 Biss. 315; *Atkins v. Petersburg R. Co.*, 3 Hughes, 307; *Davis v. Gray*, 16 Wall. 203; *Douglas v. Cline*, 12 Bush, 608; *Tomney v. Spartanburg &c. R. Co.*, 4 Hughes, 640; *Kelly v. Receiver of Green Bay &c. R. Co.*, 10 Biss. 151; s. c. 5 Fed. Rep. 846; *Calhoun v. St. Louis &c. R. Co.*, 9 Biss. 330; *Ellis v. Boston, Hartford & Erie R. Co.*, 107 Mass. 28; *Coe v. Cincinnati, P. & I. R. Co.*, 10 Ohio St. 372; s. c. 75 Am. Dec. 518; *Gurney v. Atlantic &c. R. Co.*, 58 N. Y. 358; *Union Trust Co. v. New York &c. R. Co.*, 25 Fed. Rep. 803.

¹ *Wilson v. Gaines*, 103 U. S. 417.

² *Memphis &c. R. Co. v. Berry*, 112 U. S. 608; *New Orleans &c. R. Co. v. Delaware*, 114 U. S. 296.

³ *Wilson v. Gaines*, 103 U. S. 417; *Coe v. Midland &c. R. Co.*, (1879) 31 N. J. 105.

⁴ *Smith v. McCullough*, 104 U. S. 25; *Brainerd v. Peck*, 34 Vt. 496.

⁵ *Coe v. Midland &c. R. Co.*, (1879) 31 N. J. Eq. 105.

⁶ *Alabama v. Montague*, (1885) 117 U. S. 602; *Shamokin Valley R. Co. v. Livermore*, (1864) 47 Pa. St. 465; s. c. 86 Am. Dec. 552; *Youngman v. Elmira &c. R. Co.*, 65 Pa. St. 278; *Van Keuren v. Central R. Co.*, 38 N. J. 165; *Dinsmore v. Racine R. Co.*, 12 Wis. 649; *Morgan v. Donovan*, 58 Ala. 241. *Cf. Wilson v. Boyce*, 92 U. S. 320; *St. Louis &c. R. Co. v. McGee*, 115 U. S. 476; *Calhoun v. Memphis &c. R. Co.*, 2 Flip. 442; *Gardner v. London &c. R. Co.*, L. R. 2 Ch. App. 201.

⁷ *Milwaukee &c. R. Co. v. Milwaukee &c. R. Co.*, (1866) 20 Wis. 174; s. c. 22 Am. Rep. 70, n.; *Merchants' Bank v. Petersburg R. Co.*, 12 Phila. 482.

cern created by the act of incorporation.¹ For, as a rule, mortgage debentures are made floating securities, so as not to interfere with the company's ordinary business operations; and a debenture of that kind will not prevent the company from giving specific charges upon portions of its assets in priority of the debentures, provided the specific charges are in the ordinary course of business, and for the purposes thereof.² And so strong is this rule, that where a debenture trust deed contained a provision that the principal moneys and interest intended to be secured by the debentures should take precedence over all moneys which might thereafter be raised by the company by any means whatsoever, it was held that the company could mortgage specific property not comprised in the deed, so as to give the mortgage priority over the debentures.³

§ 749. Whether the mortgage covers fixtures.—As in the case of mortgages by individuals, corporate mortgages of realty carry fixtures as distinguished from personal property.⁴ And what constitutes a fixture is determined by the same rules, although the object, the effect and the mode of annexation must be all taken into consideration.⁵ Accordingly, articles which have become affixed to the realty, thereby partaking of its nature, whether acquired before or after the execution of a general mortgage of the real estate of the company, are subject to the lien thereof.⁶ But a mortgage by a corporation of certain land with a factory thereon carries not all the machinery therein, but only so much thereof as has been so

¹Gardner v. London &c. R. Co., L. R. 2 Ch. App. 201; Myatt v. St. Helens Ry. Co., 2 Q. B. 364; Hart v. Eastern Union Ry. Co., 7 Ex. 246; King v. Marshall, 33 Beav. 565; *Ex parte* Stanley, 33 L. J. Ch. 535; Moor v. Anglo-Italian Bank, 10 Ch. Div. 681; Legg v. Mathieson, 2 Giff. 71; Wickham v. New Brunswick &c. Ry. Co., L. R. 1 P. C. 64.

²Wheatley v. Silkstone &c. Co., 29 Ch. Div. 715.

³Buzzard v. Threlfalls Brewery Co., 88 L. T. 396.

⁴Southbridge Savings Bank v. Mason, (1888) 147 Mass. 500.

⁵Southbridge Savings Bank v. Mason, (1888) 147 Mass. 500; Smith Paper Co. v. Servin, 130 Mass. 513; McConnell v. Blood, 123 Mass. 47; s. c. 25 Am. Rep. 12; McLaughlin v. Nash, 14 Allen, 136; s. c. 92 Am. Dec. 741.

⁶Porter v. Pittsburg &c. Co., 122 U. S. 267, 283.

annexed to the realty as to become a part thereof.¹ So also a mortgagee of real estate devoted to the purposes of a brewery is entitled only to articles attached to the realty in such a manner as to be regarded as fixtures, whether they be necessary to the successful operation of the particular establishment or not.² A mortgage of a factory *eo nomine*, however, includes, *ex vi termini*, all the machinery and other articles to the factory.³ So, manifestly, a mortgage of lands, factories, machinery and fixtures carries all machines permanently attached to the factory or adapted thereto, whether ever actually used or not.⁴ But the placing of the wires of one telegraph company upon the poles of another by an agreement giving that privilege for a rent to be paid, does not make them fixtures of the company owning the poles so as to be covered by its mortgage.⁵ Furniture in offices and places of business is not regarded as fixtures;⁶ nor is fuel;⁷ nor are tools and implements not attached to the realty.⁸ Rolling-stock, however, is generally held to be so affixed to a railway as to pass under a general mortgage thereof,⁹ unless, of course, owned by

¹ Rogers v. Prattville Manuf. Co., 81 Ala. 483.

² Penn &c. Ins. Co. v. Semple, (1884) 38 N. J. Eq. 575.

³ Delaware &c. R. Co. v. Oxford Iron Co., (1883) 36 N. J. Eq. 452; Potts v. New Jersey Arms Co., (1865) 17 N. J. Eq. 395; Voorhis v. Freeman, 2 Watts & S. 116; Pyle v. Pennock, 2 Watts & S. 390; Teaff v. Hewitt, 1 Ohio St. 511; Ewell on Fixtures, 308.

⁴ Delaware &c. R. Co. v. Oxford Iron Co., (1883) 36 N. J. Eq. 452.

⁵ Farnsworth v. Western &c. Co., (1889) 25 N. Y. St. Rep. 398; s. c. 6 Ry. & Corp. L. J. 284; Porter v. Steel Co., (1887) 123 U. S. 267, 283; United States v. Railroad Co., 12 Wall. 362; Telegraph Co. v. Middleton, 80 N. Y. 408; Trustees v. Wheeler, 61 N. Y. 88, 118; Tift v. Horton, 53 N. Y. 377; Railway Co. v. Telegraph Co., 36 Hun, 205.

⁶ Hunt v. Bullock, (1860) 23 Ill. 320;

Raymond v. Clark, 46 Conn. 129; Ludlow v. Hurd, 1 Disney, 552; Titus v. Mabey, 25 Ill. 257; Lehigh &c. Co. v. Central R. Co., (1882) 35 N. J. Eq. 379.

⁷ Hunt v. Bullock, (1860) 23 Ill. 320. *Contra*, Coe v. McBrown, 22 Ind. 252.

⁸ Lehigh &c. Co. v. Central R. Co., (1883) 35 N. J. Eq. 379; Williamson v. New Jersey &c. R. Co., 29 N. J. Eq. 311; s. c. 28 N. J. Eq. 277.

⁹ Minnesota Co. v. St. Paul Co., (1867) 6 Wall. 142; Milwaukee &c. R. Co. v. Milwaukee &c. R. Co., 6 Wall. 742; Milwaukee &c. R. Co. v. Soutter, 2 Wall. 609; Gue v. Tidewater Co., 24 How. 257; Phillips v. Winslow, 18 B. Mon. 431; s. c. 68 Am. Dec. 729; Macon &c. R. Co. v. Parker, 9 Ga. 377; Youngman v. Elmira &c. R. Co., (1870) 65 Pa. St. 278; Shamokin Valley R. Co. v. Livermore, 47 Pa. St. 465; s. c. 85 Am. Dec. 552; Coney v. Pittsburgh &c. R. Co., 8

other parties.¹ Rails, new or old, destined for use or having been in use, are fixtures of railways.² And bridges, rails and such like articles, which become affixed to a railway, are subject to the lien of a mortgage thereon.³ All questions as to what are fixtures are for the jury, whose findings can not be set aside unless clearly erroneous.⁴

§ 750. Of future-acquired property.—By express words of futurity, a corporation may validly mortgage property to be subsequently acquired.⁵ When such words are used, future acquisitions of property, whether corporeal or incorporeal, are included.⁶ And when property is afterward acquired, the lien of the mortgage attaches instantly, as effectually as if it had been particularly described.⁷ But, as in the case of gen-

Phila. 173; *Hamlin v. Jerrard*, 72 Me. 62. But in several of the States rolling-stock is held to be personal property. *Hoyle v. Plattsburgh & C. R. Co.*, (1873) 54 N. Y. 314; s. c. 13 Am. Rep. 595; *Randall v. Elwell*, 52 N. Y. 521; s. c. 11 Am. Rep. 747; *Stevens v. Buffalo & C. R. Co.*, 31 Barb. 590; *Williamson v. New Jersey & C. R. Co.*, 29 N. J. Eq. 311, reversing s. c. 28 N. J. Eq. 277; *Boston & C. R. Co. v. Gilmore*, (1858) 37 N. H. 410; *Coe v. Columbus & C. R. Co.*, (1859) 10 Ohio St. 372; s. c. 75 Am. Dec. 518. And in Illinois the State constitution ordains that the rolling-stock of railways shall be deemed personal property. *Scott v. Clinton & C. R. Co.*, 6 Biss. 529, where it was held, however, that the general mortgage covered the rolling-stock until attached by creditors.

¹ *Hardesty v. Pyle*, 15 Fed. Rep. 778. See also *Meyer v. Johnston*, (1875) 53 Ala. 237.

² *Salem Bank v. Anderson*, 75 Va. 250; *Lehigh & C. Co. v. Central R. Co.*, (1883) 35 N. J. Eq. 379; *Wutjen v. St. Paul & C. R. Co.*, 4 Hun, 529; *Palmer v. Forbes*, (1860) 23 Ill. 301. Cf. *Farmers' Loan & Trust Co. v. Commercial Bank*, 15 Wis. 465; s. c.

82 Am. Dec. 689; *Farmers' Loan & Trust Co. v. Cary*, 13 Wis. 110; *Dinsmore v. Racine & C. R. Co.*, 12 Wis. 649. Also *Brainerd v. Peck*, 34 Vt. 496.

³ *Porter v. Pittsburg & C. Co.*, (1887) 122 U. S. 267, 283, citing *Fosdick v. Schall*, 99 U. S. 235, 251; *Dillon v. Bernard*, 21 Wall. 430, 440; *United States v. New Orleans R. Co.*, 12 Wall. 362, 365; *Galveston R. Co. v. Cowdrey*, 11 Wall. 459, 480, 482; *Dunham v. Cincinnati & C. R. Co.*, 1 Wall. 254.

⁴ *Southbridge Savings Bank v. Mason*, (1888) 147 Mass. 500; *Montgomery v. Pickering*, 116 Mass. 230; *Reed v. Reed*, 114 Mass. 372.

⁵ *Dunham v. Cincinnati & C. R. Co.*, (1863) 1 Wall. 254; *Coney v. Pittsburg & C. R. Co.*, 3 Phila. 173; *Coopers v. Wolf*, 15 Ohio St. 523; *Ludlow v. Hurd*, 1 Disn. 552; *In re General South American Co.*, 2 Ch. Div. 337; *In re Panama & C. Mail Co.*, 5 Ch. 318; *Willink v. Andrews*, 16 Ir. R. C. L. 201.

⁶ *Williamson v. New Jersey & C. R. Co.*, 26 N. J. Eq. 398; *Buck v. Seymour*, 46 Conn. 156; *Texas & C. Ry. Co. v. Gentry*, (1888) 69 Tex. 625.

⁷ *Parker v. New Orleans & C. R.*

eral descriptive language, a futurity clause will not include property not properly connected with the company's business,¹ or unlawfully acquired.² Nor do such clauses in general mortgages create a lien upon calls or unpaid subscriptions to the capital stock of the company.³ A mortgage of all the property of a company in general terms embraces future acquisitions even without especial words of futurity,⁴ but only of property which the company had the right at the time to acquire.⁵

§ 751. **Mortgages of income.**—Although when a general mortgage is paid, it must be out of the income, and the net earnings may be specifically subjected thereto by the mortgagee's taking possession of the property, without words of futurity, income is not specifically covered by the lien of the mortgage.⁶ And so long as the earnings remain in the hands of the company they are subject to attachment by the general creditors,⁷ unless specifically made subject to the mortgage

Co., 33 Fed. Rep. 693; Galveston &c. R. Co. v. Cowdrey, (1870) 11 Wall. 459; New Orleans &c. R. Co. v. Mullen, 12 Wall. 365; Scott v. Clinton &c. R. Co., 6 Biss. 535; Barnard v. Norwich &c. R. Co., 4 Cliff. 365; Dillon v. Barnard, 1 Holmes, 394.

¹ Shamokin Valley R. Co. v. Livermore, 47 Pa. St. 465; s. c. 85 Am. Dec. 552; Calhoun v. Paducah &c. R. Co., 9 Cent. L. J. 66; Mississippi Valley Co. v. Chicago &c. R. Co., 58 Miss. 896; s. c. 38 Am. Rep. 348, 350; Calhoun v. Memphis &c. R. Co., 2 Flip. 442; United States Trust Co. v. Wabash &c. R. Co., (1887) 32 Fed. Rep. 480; Seymour v. Canandaigua &c. R. Co., (1857) 25 Barb. 284; Morgan v. Donovan, 58 Ala. 241; Hamlin v. European &c. R. Co., 72 Me. 83.

² Randolph v. New Jersey &c. R. Co., (1878) 28 N. J. Eq. 49; Field v. Post, 38 N. J. Eq. 346; Williamson v. New Jersey &c. R. Co., 28 N. J. Eq. 277; Frazier v. Frederick, 23 N. J. Eq. 162. See Coe v. New Jersey &c. R. Co., (1879) 31 N. J. Eq. 105.

³ Dean v. Biggs, 25 Hun, 122; Gardner v. London &c. Ry. Co., 2 Ch. 201; King v. Marshall, 33 B. 565; *Ex parte* Stanley, 33 L. J. Ch. 535; Moor v. Anglo-Italian Bank, 10 Ch. Div. 681; 8 Vic. ch. 16, § 43. But see Pickering v. Ilfracombe Ry. Co., L. R. 3 C: P. 235.

⁴ Shaw v. Bill, (1877) 95 U. S. 10; Pennock v. Coe, 23 How. 117; Farmers' Loan & Trust Co. v. Commercial Bank, 15 Wis. 465; s. c. 82 Am. Dec. 689; Dinsmore v. Racine &c. R. Co., 12 Wis. 649; Pierce v. Emery, (1858) 37 N. H. 410; Ludlow v. Hurd, 1 Disn. 552.

⁵ Seymour v. Canandaigua &c. R. Co., (1857) 25 Barb. 284; Meyer v. Johnston, 53 Ala. 237; Campbell v. Texas &c. R. Co., 2 Woods, 263.

⁶ Pullan v. Cincinnati &c. R. Co., (1873) 5 Biss. 237; Emerson v. European &c. R. Co., (1877) 67 Me. 387; s. c. 24 Am. Rep. 39.

⁷ Gilman v. Illinois &c. R. Co., 91 U. S. 603; Galveston R. Co. v. Cowdrey, 11 Wall. 459; Clay v. East Ten-

lien.¹ When, however, the income of a corporation is specifically mortgaged, as it may be,² it is only the net earnings after paying the operating expenses that are available, and if gross earnings are diverted to the mortgagees, the general creditors acquire a claim against them.³ So also an income railway mortgage, although it is a pledge of tangible property for the payment of the principal sum, is, as a security for the payment of interest, but little more than the pledge of the good faith of the company in managing its lines; it necessarily contemplates that such improvements as seem necessary to the efficient use and operation of the property, and such alterations in the *corpus* as appear desirable, are to be made at the discretion of the directors, and unless it contains some limitations upon the powers of the directors, express or implied, the right of the company to conduct its operations as it may seem fit, subject only to the conditions of its organic law, is unqualified; and consequently, the company can lawfully extend its lines, acquire new ones, discontinue old ones, and thus essentially change the earning capacity of the property.⁴ The mortgage intrusts the directors with a wide discretion in determining what is to be treated as net

nessee &c. R. Co., (1871) 6 Heisk. 421; *Smith v. Eastern R. Co.*, 124 Mass. 154; *Ellis v. Boston &c. R. Co.*, 107 Mass. 1; *Emerson v. European &c. R. Co.*, (1877) 67 Me. 387; s. c. 24 Am. Rep. 39; *Noyes v. Rich*, 52 Me. 115; *Bath v. Miller*, 51 Me. 341; *Mississippi &c. R. Co. v. United States Express Co.*, 81 Ill. 254; *Galena &c. R. Co. v. Menzies*, 26 Ill. 121; *Dunham v. Isett*, 15 Iowa, 284.

¹ *Emerson v. European &c. R. Co.*, (1877) 67 Me. 387; s. c. 24 Am. Rep. 39; *De Graff v. Thompson*, 24 Minn. 452. *Cf. Thompson v. Little Rock &c. R. Co.*, 15 Fed. Rep. 6; *Addison v. Lewis*, (1881) 75 Va. 701; *Kelly v. Alabama R. Co.*, 58 Ala. 489.

² *Rutten v. Union Pac. Ry. Co.*, (1893) 17 Fed. Rep. 480; *Pullan v. Cincinnati &c. R. Co.*, (1873) 5 Biss. 237; *Barry v. Missouri &c. Ry. Co.*, 27 Fed. Rep. 1, 7.

³ *Calhoun v. St. Louis &c. R. Co.*, 14 Fed. Rep. 9; *Parkhurst v. Northern Central R. Co.*, 19 Md. 472; s. c. 81 Am. Dec. 648. As to who are entitled to rents and profits under a railroad mortgage, see further: *Galveston &c. R. Co. v. Cowdrey*, 11 Wall. 459; *McCalester v. Maryland*, 114 U. S. 605; *Fosdick v. Schall*, (1878) 99 U. S. 253; *American Bridge Co. v. Heidelbach*, 94 U. S. 800; *Gilman v. Illinois &c. Tel. Co.*, 91 U. S. 617; s. c. 1 McCrary, 173; *Young v. Northern Illinois &c. Co.*, 9 Biss. 305; s. c. 13 Fed. Rep. 809; *Gilman v. Illinois &c. Tel. Co.*, 1 McCrary, 173; *Dow v. Memphis &c. R. Co.*, 124 U. S. 652; s. c. 20 Fed. Rep. 770; *Hay v. Railroad Co.*, 4 Hughes, 374.

⁴ *Spies v. Chicago &c. R. Co.*, (1889) 40 Fed. Rep. 34; s. c. 6 Ry. & Corp. L. J. 463; *Day v. Ogdensburgh &c. R. Co.*, 107 N. Y. 129, 146.

income. Their conclusions, when embodied in a resolution of the board, are not vitiated by an error of judgment, and can only be disturbed when the circumstances establish bad faith.¹ But when the mortgage specifically charges the income of particular lines, their duty to the bondholder requires them to make an honest effort to ascertain the net earnings of the original lines at the several interest periods; and this they can not do practically unless a separate account of the earnings and expenses of those lines are kept.² It is important, therefore, that any limitations upon the general powers of the directors, intended to define the boundaries of their discretion, should be given due effect if the mortgage is to afford any substantial security to bondholders for the payment of their interest, and if these are found in the instrument they should not be nullified by a latitudinarian interpretation calculated to relegate bondholders to the position of stockholders. They are not stockholders, but creditors, who contract upon the assurance that the income fund upon which they rely when they purchase the bonds, is to continue to exist during the life of the mortgage.³ On application for an injunction against misappropriation of income, which has suddenly fallen from a large sum to nothing, the company must sustain its position by figures showing the condition of its business.⁴

§ 752. Recording mortgages.—Corporate mortgages must be recorded in the same manner and for the same purpose as those upon the property of natural persons. Accordingly

¹ *Spies v. Chicago &c. R. Co.*, (1889) 40 Fed. Rep. 34; s. c. 6 Ry. & Corp. L. J. 463; *Day v. Ogdensburgh &c. R. Co.*, 107 N. Y. 129, 146.

² *Barry v. Missouri &c. R. Co.*, 27 Fed. Rep. 1; *McIntosh v. Flint &c. R. Co.*, 34 Fed. Rep. 582. The perfunctory ceremony of passing a resolution that no income has been earned, without an attempt to ascertain the fact, is not compliance with the letter or the spirit of the contract. *Spies v. Chicago &c. R. Co.*, (1889) 40 Fed. Rep. 34; s. c. 6 Ry. & Corp. L. J. 463.

³ *Spies v. Chicago &c. R. Co.*, (1889) 40 Fed. Rep. 34; s. c. 6 Ry. & Corp. L. J. 463. As to what sums may be deducted from the gross earning of a railway company in determining the amount of net earnings, see *Beach on Railways*, § 632, citing *Barry v. Missouri &c. R. Co.*, 27 Fed. Rep. 1; s. c. 24 Fed. Rep. 829; s. c. 4 Ry. & Corp. L. J. 198.

⁴ *Barry v. Missouri &c. R. Co.*, 36 Fed. Rep. 228.

car trust contracts, and other leases and conditional sales where payments are to be made in instalments for personal property, must be recorded as chattel mortgages.¹ But corporate mortgages covering both realty and personalty need not be recorded as chattel mortgages.² Nor in England need a debenture charging personal as well as real property be registered as a bill of sale.³ A foreign corporation being a non-resident, the recording of its mortgage covering personalty as well as realty, does not give the mortgagee a lien as against creditors who sue before the foreclosure proceedings, where, under a statute, a mortgage of personalty, to be valid as against third parties, must be recorded in the county in which the mortgagor resides.⁴ An informally executed corporate mortgage can not be recorded.⁵ Under a statute refusing to a corporate mortgage any priority over existing unsecured creditors, where a corporate debt secured by a mortgage was assumed by another corporation and a new mortgage given, the first mortgage being cancelled of record, and subsequently the original debtor resumed the debt, giving a new mortgage, the second mortgage being cancelled, it was held that, as against intermediate creditors, no lien or priority could be claimed under the cancelled mortgages.⁶ An unrecorded mortgage is nevertheless valid as between the parties thereto,

¹ *Heryford v. Davis*, (1880) 102 U. S. 235; *Hervey v. Rhode Island & Co.*, 93 U. S. 664; *Frank v. Denver & Co. R. Co.*, (1885) 23 Fed. Rep. 123; *Fosdick v. Schall*, (1878) 99 U. S. 235, 250; *Green v. Van Buskirk*, 5 Wall. 307; *Murch v. Wright*, 46 Ill. 488; s. c. 95 Am. Dec. 455.

² *Metropolitan Trust Co. v. Pennsylvania R. Co.*, (1886) 25 Fed. Rep. 760; *Farmers' Loan & Trust Co. v. St. Joseph & Co. R. Co.*, 3 Dill. 412. Cf. *Hammond v. Farmers' & Co.*, 105 U. S. 77; *Williamson v. New Jersey & Co. R. Co.*, 29 N. J. Eq. 311.

³ *Reid v. Joannon*, 25 Q. B. Div. 300. Cf. *Edwards v. Edwards*, 2 Ch. Div. 297; *Davis v. Goodman*, 5 C. P. Div. 128; *Edmonds v. Blaina*

& Co., 36 Ch. Div. 215; *Levy v. Abercarris & Co.*, 37 Ch. Div. 260; *Sopham v. Grenside*, 37 Ch. Div. 281; *Swift v. Pannell*, 24 Ch. Div. 210; *Casson v. Churchman*, 53 L. J. Q. B. 335; *Connelly v. Steer*, 7 Q. B. Div. 520; *Ross v. Army & Co.*, 34 Ch. Div. 43; *Jenkinson v. Brandley Min. Co.*, 19 Q. B. Div. 568; *Brocklehurst v. Railway & Co.*, Week. Notes, 1884, p. 70.

⁴ *Watson v. Thompson Lumber Co.*, (1887) 49 Ark. 83, construing Ark. Dig. Laws, § 4742.

⁵ *Duke v. Markham*, (1890) 105 N. C. 131.

⁶ *Traders' Nat. Bank v. Lawrence Manuf. Co.*, (1887) 96 N. C. 298.

and has priority over the claims of other persons extending credit to the corporation with actual knowledge thereof.¹ It has been decided in England, however, that under a law which requires all mortgages and charges specifically affecting property of a company to be registered in the company's register of mortgages, the omission to so register, even in the case of a mortgage to a director, will not invalidate the charge.²

§ 753. **Mortgage bonds.**—The debt secured by a corporate mortgage is usually in the form of bonds, although not necessarily so.³ Neither are bonds necessarily secured by mortgage. They may be wholly unsecured, or may constitute a lien without a mortgage.⁴ Generally there is nothing in the enabling acts which restricts the power of a corporation to issue bonds for a debt already in existence, and there is usually no question as to the validity of bonds negotiated only for the purpose of securing or paying debts contracted before the negotiation.⁵ Accordingly where bonds of a corporation were issued on the understanding that they were to be sold for cash, but were, in fact, pledged to a creditor as collateral to corporate notes held by him, it was held that the objection that this disposition of them was unlawful was open only to the corporation or its stockholders, unless it also affected some existing right of other parties; and that it could not be raised by one who held the property of the corporation under a voluntary conveyance, or by a purchaser of the equity of redemption at execution sale.⁶ But a statute may restrict corporations organized thereunder to the issue of bonds for a new adequate valuable consideration increasing the available funds of the

¹ *Coe v. Columbus &c. R. Co.*, 10 Ohio St. 372; s. c. 75 Am. Dec. 518. But where creditors of the railway company, having no actual notice of an unrecorded mortgage, have the right to levy upon the corporate property, they will not be postponed to the mortgage creditors by reason of the latter having instituted foreclosure proceedings. *Coe v. New Jersey Midland R. Co.*, 31 N. J. Eq. 105.

² *Wright v. Horton*, (1887) 12 App. Cas. 371.

³ *Jones on Corporate Bonds and Mortgages*, § 169; *Fitch v. Wetherbee*, 110 Ill. 475.

⁴ *Jones on Corporate Bonds and Mortgages*, § 170; *In re Atlantic &c. R. Co.*, 3 Hughes, 320.

⁵ *Lord v. Yonkers Fuel Gas Co.*, (1886) 99 N. Y. 547.

⁶ *Beecher v. Marquette &c. Co.*, 45 Mich. 108.

company.¹ If part of a series of bonds is issued under an agreement that the rest shall not be negotiated, the part so sold will have priority over the rest sold in violation of the agreement and held by purchasers with notice.² But such a residue of unissued bonds is in no sense a collateral for the payment of the floating debt of the company.³ Where the holders of first mortgage bonds agree to exchange them for second mortgage bonds, and surrender them but receive none in exchange, their debt holds the same priority as the bonds agreed to be issued in exchange, even outranking mortgages made prior to the agreement to one with notice thereof.⁴ Where bonds of a State are received and sold by a corporation which agrees to pay them, the corporation becomes the principal debtor, and the lien reserved to the State to secure the bonds, inures to the bondholders although they have been declared unconstitutional and void as to the State.⁵ When an act has been held to be unconstitutional by the State court, but has been upheld by the federal courts, bonds issued under it are proper subjects of compromise, and a tax levied to pay such compromise bonds is valid.⁶ And bonds of a corporation, purchased by its receivers and entered on the books as investments, for years reported as outstanding, and then re-issued for value, were held not to have been paid and to be still secured by the original lien.⁷

§ 754. Registration of bonds.—Under the provision of an act requiring the registration of all bonds issued by public and private corporations, and prescribing a penalty for non-compliance therewith, an action at law may be maintained for the

¹ *Kemble v. Wilmington &c. R. Co.*, 13 Phila. 469, construing Pa. Act of April 8, 1861.

² *McMurray v. Moran*, (1890) 134 U. S. 150.

³ *Merchants' Bank v. Goddin*, 76 Va. 503.

⁴ *Fidelity &c. Co. v. Shenandoah Val. R. Co.*, (1890) 33 W. Va. 761.

⁵ *Thompkins v. Little Rock &c. R. Co.*, 15 Fed. Rep. 6; *Railroad Cos. v. Schutte*, (1880) 103 U. S. 118, 139, 140; *Trustees v. Jacksonville &c. R.*

Co., 16 Fla. 708; *State v. Florida Central R. Co.* 15 Fla. 690. *Cf. Littlefield v. Bloxam*, 117 U. S. 420; *Hay v. Railroad Co.*, 4 Hughes, 349; *Tompkins v. Little Rock &c. R. Co.*, 5 McCrary, 602, 610; s. c. 18 Fed. Rep. 347, 352, 354; s. c. 21 Fed. Rep. 370.

⁶ *State v. Hannibal &c. R. Co.*, (Mo. 1890) 13 S. W. Rep. 505.

⁷ *Gibbes v. Greenville & Columbia R. Co.*, 15 S. C. 304.

recovery of the penalty although the minimum amount be not fixed by the act.¹ Under a section of the act which provides that any person placing corporate bonds in circulation without making due returns thereof to the secretary of State shall be subject to a fine for each bond so circulated, the only remedy is by indictment and an action at law can not be maintained.² In a prosecution under a registration act, the corporation may submit evidence of its good faith in issuing bonds without making a return thereof to the secretary of State and of its ignorance of the law by way of mitigation of damages.³ Where transfers of bonds are required to be registered and the secretary of the company is required to keep a register thereof open to the inspection of persons interested, those entitled to inspect the register may do so either in person or by attorney.⁴

§ 755. Bonds convertible into stock.—Bonds containing a provision for their exchange into stock of the company issuing them are sometimes authorized by statute together with provision for an increase of stock.⁵ And it has been held that a statute authorizing the issue of bonds with the right of conversion into stock conferred authority upon the corporation to increase its capital stock beyond the amount fixed by its charter, if it were necessary so to do in order to issue shares of stock in exchange for the bonds.⁶ But an eminent authority doubts this doctrine and discredits the cases upon which it rests.⁷ The holder of convertible bonds may generally de-

¹ *McDaniel v. Gate City Gas-Light Co.*, (1887) 79 Ga. 58, decided under Ga. Act of Feb. 23, 1876.

² *McDaniel v. Gate City Gas-Light Co.*, (1887) 79 Ga. 58.

³ *McDaniel v. Gate City Gas-Light Co.*, (1887) 79 Ga. 58.

⁴ *In re Credit Co.*, 11 Ch. Div. 256, construing 8 Vic. ch. 16, § 45.

⁵ *E. g. Chaffee v. Middlesex R. Co.*, (1888) 146 Mass. 224; *Muhlenburgh v. Philadelphia &c. R. Co.*, 47 Pa. St. 16.

⁶ *Belmont v. Erie Ry. Co.*, 52 Barb. 637, 669. See also *Ramsey v. Erie*

Ry. Co., 33 How. Pr. 193, 216; *Beach on Railways*, 633. *Cf. Ramsey v. Gould*, 57 Barb. 398; s. c. 8 Abb. Pr. (N. S.) 170; *Pratt v. American Bell Telephone Co.*, (1886) 141 Mass. 225; s. c. 12 Am. & Eng. Corp. Cas. 110; s. c. 55 Am. Rep. 465.

⁷ *Jones on Corporate Bonds and Mortgages*, § 62. But a company having power to increase its capital stock may receive its bonds in payment for its new shares. *Lohman v. New York &c. R. Co.*, 2 Sandf. 39; *Reed v. Hayt*, 51 N. Y. Super. Ct. Rep. 121.

mand stock in exchange for them at any time before maturity, even just before payment of a dividend, in which case he is none the less entitled to the dividend.¹ But the issue of notes with coupons attached convertible at two named periods into the stock of the company issuing them, does not operate as an appropriation of stock held by the company so as to give holders of the notes the rights of stockholders before the time arrives for the conversion.² A demand for conversion at ten minutes before three o'clock in the afternoon of the day of maturity has been held to be in time.³ But neither convertible bonds nor the coupons attached thereto are negotiable promissory notes within the meaning of statutes relating to days of grace.⁴ The right to demand the conversion of the bond into stock, runs with the bond, and can not be retained when the bond is transferred; nor can it be transferred separately from the bond.⁵ Upon the consolidation of two corporations, the holder of the bonds of one, containing a clause authorizing their conversion at any time into stock at par, can not be deprived of his right to demand conversion, and relegated to different rights conferred by the articles of consolidation, until he has had a fair opportunity, after notice, to exercise his original rights, and has elected not to do so.⁶

§ 756. **Validity of bonds issued below par.**—In England debentures may be issued at a discount;⁷ and directors themselves may take them as others do, and at the same discount.⁸ Accordingly they may be deposited as security for a loan of less than their face value and rank *pari passu* with the other debentures.⁹ The Supreme Court of the United States also

¹ Jones v. Terre Haute &c. R. Co., 57 N. Y. 196. But see Sutcliff v. Cleveland &c. R. Co., 24 Ohio St. 147.

² Pratt v. American Bell Telephone Co., (1886) 141 Mass. 225.

³ Chaffee v. Middlesex R. Co., (1888) 146 Mass. 224, 236. Cf. Muhlenburgh v. Philadelphia &c. R. Co., 47 Pa. St. 16.

⁴ Chaffee v. Middlesex R. Co., (1888) 146 Mass. 224, construing Mass. Stat. ch. 77, §§ 9, 10.

⁵ Beach on Railways, § 633; Denny

v. Cleveland &c. R. Co., 28 Ohio St. 108, 114.

⁶ Rosenkrans v. Lafayette &c. Ry. Co., 18 Fed. Rep. 513.

⁷ In re Anglo-Danubian &c. Co., 20 Eq. 339; In re Regents' Canal &c. Co., (1876) 3 Ch. Div. 43; In re Compagnie Generale de Bellegarde, (1876) 4 Ch. Div. 470.

⁸ In re Compagnie Generale de Bellegarde, (1876) 4 Ch. Div. 470.

⁹ In re Regents' Canal &c. Co., (1876) 3 Ch. Div. 43.

holds that a *bona fide* holder of bonds may collect their full amount from the company, although he paid less than their par value.¹ Justice Field, speaking for that court, says, "There are numerous decisions in conflict with this view of the law; but the sounder rule, and the one in consonance with the common understanding and usage of commerce, is that the purchaser, at whatever price, takes the benefit of the entire obligation of the maker. Public securities, and those of private corporations, are constantly fluctuating in price in the market, one day above par and the next below it, and often passing within short periods from one-half of their nominal value to their full value. Indeed, all sales of such securities are made with reference to prices current in the market, and not with reference to their par value. It would introduce, therefore, inconceivable confusion if *bona fide* purchasers on the market were restricted in their claims upon such securities to the sums they had paid for them."² Accordingly, in the absence of fraud, bonds ten times greater in amount than the sum paid the company therefor, have been upheld as valid.³ An issue below par can not be attacked under laws against usury where the charter of a corporation allows it to borrow money on such terms as its directors may determine, and issue bonds or other evidences of indebtedness.⁴ One who has, without consideration, received from an insolvent corporation

¹ *Cromwell v. Sac County*, (1877) 96 U. S. 51, 59; *Junction R. Co. v. Bank of Ashland*, (1870) 12 Wall. 226; *Grand Rapids &c. R. Co. v. Sanders*, 17 Hun, 552; *Williams v. Smith*, 2 Hill, 301; *Stoddard v. Kimball*, 6 Cush. 469; *Chicopee Bank v. Chapin*, 8 Met. 40; *Allaire v. Harts-horne*, (1848) 21 N. J. 665; *Lay v. Wissman*, 36 Iowa, 305.

² *Cromwell v. Sac County*, (1877) 96 U. S. 51, 60. Where plaintiff's intestate conveyed a railway to defendant, and agreed to accept, as part of the purchase money, bonds secured by mortgage on the line, he is entitled, the bonds never having been given, to recover their full par value, although they are below par

in the market. *Texas &c. Ry. Co. v. Gentry*, (1888) 69 Tex. 625.

³ *Duncomb v. New York &c. R. Co.*, 88 N. Y. 1.

⁴ *Traders' National Bank v. Lawrence Manuf. Co.*, (1887) 96 N. C. 298. But see *Sherlock v. Winetka*, (1873) 68 Ill. 539, where in holding that while an issue of corporate bonds below par is an abuse of power on the part of the corporate officers for which they are probably individually liable to the extent of the loss thereby incurred, yet that their act would not render the bonds void, the court intimated that it might be relied upon in the hands of the original holder as usury.

its second mortgage bonds, is not rendered liable to the creditors of the corporation, as having withdrawn some of the funds of the corporation, by the fact that an interest coupon of the bonds has been paid, in the absence of proof that the payment was made by the corporation.¹ Nor is a bondholder of that character rendered liable by the fact that, on foreclosure of the first mortgage, the holders of the second mortgage bonds were given bonds of the new corporation formed to succeed the other, where it appears that the new corporation obtained the property from the purchaser at the foreclosure sale, who paid for it in first mortgage bonds, the price for which it sold being less than the amount of the first mortgage bonds.²

§ 757. Coupons.—Coupons are evidences of the sums due for interest on the bonds, and the fact they are made payable at a particular place does not make a presentation for payment at that place necessary before a suit can be maintained on them,³ although the defendant may in such a case show that there were funds on deposit to meet them.⁴ And to maintain suit on coupons demand and protest is not necessary, although they be in the form of orders.⁵ Interest upon overdue coupons is not illegal although it be compounding interest.⁶ Accordingly, coupons bear interest from the day they

¹ *Christensen v. Illinois & St. L. Bridge Co.*, (1889) 52 Hun, 478; s. c. 6 Ry. & Corp. L. J. 232.

² *Christensen v. Illinois & St. L. Bridge Co.*, (1889) 52 Hun, 478; s. c. 6 Ry. & Corp. L. J. 232. On a judgment for the subscription against a subscriber to railroad bonds which the company pledged and became unable to deliver, defendant is entitled to have credited the value of the bonds at the time of their hypothecation, and not merely their proportional value as measured by the mortgage security, when, after foreclosure of the mortgage, the bondholders sell out to another road at a loss. *Galena &c. R. Co. v. Ennor*, (1888) 123 Ill. 505.

³ *Walnut v. Wade*, (1880) 103 U. S. 683, 695; *Wallace v. McConnell*, 13 Pet. 136; *Irvine v. Withers*, 1 Stew. (Ala.) 234; *Montgomery v. Elliott*, 6 Ala. 701; *Warner v. Rising Fawn Iron Co.*, 3 Woods, 514; *Smith v. Tallapoosa County*, 2 Woods, 574.

⁴ *Arents v. Commonwealth*, 18 Grat. 750; *Virginia &c. R. Co. v. Clay, MS.*, cited by 2 Daniel on Negotiable Instruments, § 1490. See note to *Morris Canal &c. Co. v. Fisher*, 64 Am. Dec. 428, 438.

⁵ *Nashville v. Potomac Ins. Co.*, (1872) 2 Baxt. 296; *Nashville v. First National Bank*, 1 Baxt. 402.

⁶ *Beaver Co. v. Armstrong*, 44 Pa. St. 63. And coupons are free from the defense of usury. *Canal Co. v.*

are payable, if payment be neglected or refused.¹ The failure to present coupons for payment does not prevent the running of interest, although if the obligor shows that it had money ready to pay the coupons at the time and place where they were payable, this would be a defense to a claim for interest.² Where there is no stipulation concerning the rate of interest payable upon coupons after maturity, they will draw at the regular rate of interest in the State where they were issued. And this is the rule, although they be made payable at a financial metropolis situated in another State.³

Valette, 21 How. 414; Morris Canal Co. v. Fisher, 1 Stockt. 667; Bank of Ashland v. Jones, 16 Ohio St. 145.

¹ Walnut v. Wade, (1880) 103 U. S. 686; Aurora City v. West, 7 Wall. 82; Clark v. Iowa City, 20 Wall. 583; Town of Genoa v. Woodruff, 92 U. S. 502; Stewart v. Lansing, 104 U. S. 505; Ohio v. Frank, 103 U. S. 697; Gelpcke v. Dubuque, 1 Wall. 206; Hollingsworth v. Detroit, 3 McLean, 472; Thompson v. Lee County, 3 Wall. 227; Vose v. Philbrook, 3 Story, 336; Corcoran v. Chesapeake &c. Canal Co., 1 MacA. 358; Huey v. Macon, (1888) 35 Fed. Rep. 481; s. c. 4 Ry. & Corp. L. J. 427; Williams v. Sherman, 7 Wend. 112; Delafield v. Illinois 2 Hill, 177; Arents v. Common-

wealth, 18 Grat. 750; Philadelphia &c. R. Co. v. Smith, 105 Pa. St. 195; Philadelphia &c. R. Co. v. Fidelity &c. Co., 105 Pa. St. 216. Whether attached to the bond or severed and transferred to another person. Rich v. Seneca Falls, 8 Fed. Rep. 852; s. c. 19 Blatchf. 558; Philadelphia &c. R. Co. v. Smith, 105 Pa. St. 195; Philadelphia &c. R. Co. v. Fidelity &c. Co., 105 Pa. St. 216.

² Walnut v. Wade, (1880) 103 U. S. 696; Wallace v. McConnell, 13 Pet. 136; Huey v. Macon Co., (1888) 35 Fed. Rep. 481.

³ Rogers v. Lee County, 1 Dill. 529; Huey v. Macon County, (1888) 35 Fed. Rep. 481; s. c. 4 Ry. & Corp. L. J. 427.

CHAPTER XXXVIII.

ENTRY AND FORECLOSURE.

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| <p>§ 758. Introductory.</p> <p>759. Remedy by entry.</p> <p>760. Mortgage trustees.</p> <p>761. Trustees as receivers.</p> <p>762. Remedy by foreclosure.</p> <p>763. <i>Quasi</i>-public corporations.</p> <p>764. Jurisdiction.</p> <p>765. Parties.</p> <p>766. Holders of different liens as parties.</p> <p>767. Intervention.</p> <p>768. Foreclosure by bondholders.</p> | <p>§ 769. Respective rights of majority and minority bondholders.</p> <p>770. Foreclosure for interest alone.</p> <p>771. Actions upon coupons.</p> <p>772. Receivers in foreclosure proceedings.</p> <p>773. Defenses.</p> <p>774. The decree of foreclosure.</p> <p>775. Binding effect of the decree.</p> <p>776. Redemption.</p> <p>777. The sale.</p> |
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§ 758. **Introductory.**— Although corporate mortgages are for the benefit of all the holders of the bonds secured thereby, they are almost necessarily made to trustees.¹ For a provision in a deed of mortgage that upon default, any bondholder is entitled to enter and sell the mortgaged property, is invalid for indefiniteness of the persons upon whom the power is conferred, and the impossibility of its execution.² Accordingly a bondholder, to avail himself of his lien on the company's property, must induce the trustees to proceed to foreclose it in the mode pointed out by the statute.³ And if they refuse to act when they ought to do so, the bondholder may either compel them by *mandamus* or file a bill in equity to obtain the relief to which he may be entitled.⁴ Foreclosure proceedings can not be stayed on the ground of fraud merely because the mortgagor and mortgagee companies have a common president and directors and the mortgage trustees were directors or stockholders in the company to which the security was given.⁵

¹ *Butler v. Rahm*, (1877) 46 Md. 541.
Cf. Shaw v. Norfolk &c. R. Co., 5 Gray, 162.

² *Mason v. York &c. R. Co.*, (1861) 52 Me. 82, 103.

³ *Florida v. Anderson*, (1875) 91 U. S. 667.

⁴ *Florida v. Anderson*, (1875) 91 U. S. 667, 679.

⁵ *Leavenworth County v. Chicago*

§ 759. **The remedy by entry.**—Under provisions for entry upon default of payment, the trustees may lawfully take possession of the property without suit, and may hold it until the debt be satisfied.¹ If, however, the entry of the trustees be resisted, an order from a court of equity is the proper method of gaining possession.² Accordingly a bill in equity to gain possession, is usually resorted to notwithstanding the provision that the mortgagee may take possession.³ The effect of the decree is to establish their right of possession at the time the suit was begun, and to make the company's possession after that date wrongful.⁴ In these cases no foreclosure is asked, and possession is claimed and given by virtue of the express agreement in the mortgage.⁵ Until the bill is filed, or possession otherwise obtained, the earnings and income of the property are not affected by any lien.⁶ But when a mortgage provides that upon default the trustees, or their survivor, shall be entitled to take possession of a mortgaged railway, a court of equity has power, in an action to enforce the specific execution of the mortgage, to appoint the surviving trustee a receiver of the mortgaged property, to put him in possession thereof until the amount due is paid, and, the road being without rolling stock or other equipments, to authorize him to make provision for purchasing the necessary equipments,

&c. R. Co., (1890) 134 U. S. 688. In this case the company which had indorsed and sold the bonds had paid out large sums of money on account of its indorsement and on account of the construction of the mortgagor's railway, and there was no actual fraud, so the trust relations existing between the two companies was not regarded as invalidating the proceedings, notwithstanding the general doctrine laid down in many cases.

¹ *Dow v. Memphis &c. R. Co.*, (1888) 124 U. S. 652; *Lee v. Swingly*, (1887) 6 Mont. 596.

² *Shepley v. Atlantic &c. R. Co.*, (1867) 55 Me. 395.

³ *Shepley v. Atlantic &c. R. Co.*, (1867) 55 Me. 395; *McLane v. Placerville &c. R. Co.*, (1885) 66 Cal. 606,

615; *Sacramento &c. R. Co. v. Superior Court of San Francisco*, 55 Cal. 458; *Leeds v. Gifford*, (1886) 41 N. J. Eq. 464; *American Bridge Co. v. Heidelberg*, (1876) 94 U. S. 798; *Shaw v. Norfolk County R. Co.*, 5 Gray, 162. *Cf. Andrews v. Scotton*, 2 Bland, 629, 665.

⁴ *Dow v. Memphis &c. R. Co.*, (1888) 124 U. S. 652.

⁵ *Shepley v. Atlantic &c. R. Co.*, (1867) 55 Me. 395; *McLane v. Placerville &c. R. Co.*, (1885) 66 Cal. 606, 615.

⁶ *American Bridge Co. v. Heidelberg*, (1876) 94 U. S. 798; *Galveston R. Co. v. Cowdrey*, 11 Wall. 459; *Gilman v. Illinois &c. Co.*, 91 U. S. 603.

so as to secure an income and profits.¹ When the trustees have made demand for possession under the mortgage by filing suit therefor, the company must from that time account for earnings; and it is immaterial that a receiver was not appointed, the company itself being treated in all respects as a receiver of the property, holding for the benefit of whomsoever in the end it shall be found to concern.²

§ 760. Mortgage trustees.—Corporate mortgages are usually and of necessity made in the form of trust deeds to trustees, who act for the numerous, widely scattered and constantly shifting body of the bondholders secured by the deed.³ It is usual to constitute several trustees jointly, so that upon the death or incapacity of one or more of them their interests vest in the survivor or survivors.⁴ The trustees generally have no active duty, theirs being a dry or naked trust, until some default occurs in the payment of interest upon the bonds secured.⁵ But they may be allowed to participate in the election of directors of the company if the deed so provides.⁶ And trustees have been burdened with the duty of superintending the disbursement of the moneys borrowed upon the mortgage.⁷ In case no duties of this nature are imposed upon them, their first active business is, upon breach of the conditions of the mortgage, to enter and take possession of the property and

¹ *McLane v. Placerville &c. R. Co.*, (1885) 66 Cal. 606, 615; *Shepley v. Atlantic &c. R. Co.*, (1867) 55 Me. 395; *Shaw v. Norfolk Co. R. Co.*, 5 Gray, 162; *American Bridge Co. v. Heidelbach*, (1876) 94 U. S. 798; *Gilman v. Illinois &c. Co.*, 91 U. S. 603.

² *Dow v. Memphis R. Co.*, (1888) 124 U. S. 652, 655; *Galveston R. Co. v. Cowdrey*, 11 Wall. 459. But see *Mercantile Trust Co. v. Missouri &c. R. Co.*, (1888) 36 Fed. Rep. 221; s. c. 4 Ry. & Corp. L. J. 362.

³ *Jones on Corporate Bonds and Mortgages*, § 28.

⁴ *McAllister v. Plant*, 54 Miss. 106; *Farmers' Loan & Trust Co. v. Hughes*, 11 Hun, 130. The statutes

or the deeds themselves frequently provide for supplying vacancies. *Fletcher v. Rutland &c. R. Co.*, 39 Vt. 633; *Shaw v. Norfolk &c. R. Co.*, 5 Gray, 162; *Richards v. Merrimack &c. R. Co.*, 44 N. H. 127. Whether a foreign trust company may act as a mortgage trustee, see *Beach on Railways*, § 627, citing *Farmers' Loan & Trust Co. v. Chicago &c. Ry. Co.*, 27 Fed. Rep. 146; *Hervey v. Illinois Midland Ry. Co.*, 28 Fed. Rep. 169.

⁵ *Jones on Corporate Bonds and Mortgages*, § 287.

⁶ *New England &c. Ins. Co. v. Phillips*, (1886) 141 Mass. 535.

⁷ *Banque Franco-Egyptienne v. Brown*, 34 Fed. Rep. 162.

sell it or to institute proceedings of foreclosure.¹ When they have entered upon the property and are managing it, they become vested with the rights and subject to the liabilities of the corporation itself.² Although trustees usually retain their positions until discharged at the termination of the trust,³ they may be removed and their successors appointed by a court of equity.⁴ They are entitled to remuneration for their services, the amount thereof being usually determined by the court and payable out of the proceeds of the mortgaged property.⁵

§ 761. **Trustees as receivers.**—The position and duty of a trustee in possession are practically those of a receiver.⁶ And in a California case, the trustee being entitled to possession under the terms of the mortgage was appointed receiver by the court, that he might more effectually carry out and complete the trust delegated to him by the mortgage.⁷ But as they can not consult the entire body of the bondholders and as their duty is to each one severally, they are not at liberty to follow the advice or wishes of the majority, being still liable to the minority for a faithful administration of their trust.⁸

¹ *Sturgis v. Knapp*, 31 Vt. 1. And they may subject themselves to personal liability to the bondholders by failing to preserve the rights of their *cestui que trust*. *Ricker v. Alsop*, 27 Fed. Rep. 251. Although if it is provided that after default it shall be the duty of the trustees to take these steps "upon the written request of the holders of a majority of the bonds outstanding," they have no authority to proceed until the request be made. *Chicago &c. R. Co. v. Fosdick*, 106 U. S. 47; *Union Trust Co. v. Missouri &c. Ry. Co.*, 26 Fed. Rep. 485.

² *Jones on Corporate Bonds and Mortgages*, § 307; *Daniels v. Hart*, 118 Mass. 543; *Stratton v. European &c. Ry. Co.*, 76 Me. 269; *Wilkinson v. Fleming*, 30 Ill. 353; *Palmer v. Forbes*, 23 Ill. 301.

³ *Knapp v. Railroad Co.*, 20 Wall. 117.

⁴ *Ketchum v. Mobile &c. R. Co.*, 2 Woods, 532; *Beadle v. Knapp*, 13 Abb. Pr. 335; *North Carolina R. Co. v. Wilson*, 81 N. C. 223; *Farmers' Loan & Trust Co. v. McHenry*, 9 Abb. N. C. 235.

⁵ *Williams v. Morgan*, 111 U. S. 684.

⁶ *McLane v. Placerville &c. R. Co.*, (1885) 66 Cal. 606, 617; *Rensselaer &c. R. Co. v. Miller*, 47 Vt. 152; *Wood v. Goodwin*, 49 Me. 260; s. c. 77 Am. Dec. 259; *Ashuelot R. Co. v. Elliott*, (1874) 59 N. H. 397; *Duncan v. Mobile &c. R. Co.*, 2 Woods, 542, holding that, as their primary duty is to protect the rights of their own bondholders, they can not consent to the payment of other claims until their own bondholders have been paid or secured.

⁷ *McLane v. Placerville &c. R. Co.*, (1885) 66 Cal. 606, 614.

⁸ *Sturgis v. Knapp*, (1858) 31 Vt. 1.

§ 762. **Remedy by foreclosure.**— Unless the mortgage by necessary implication or in express terms excludes it, the common-law right to sue upon a bond is not excluded by the right of entry after default given in the mortgage.¹ Neither is a statutory remedy deemed exclusive of the ordinary remedy at common law.² Nor do provisions in the mortgage authorizing entry and action at law after the default in the payment of interest has continued six months, bar suits in equity for the foreclosure of the mortgage immediately upon default, unless clearly so intended.³ But the procedure prescribed in the mortgage deed in the event of an entry by the trustees is not binding upon the court in foreclosure proceedings.⁴ The right to foreclose does not necessarily carry with it the right to have a receiver appointed.⁵ But the inadequacy of the property as security for the mortgage debt, together with insolvency, or such precarious condition of corporate finances as renders it likely that the complainant will not be in as good a position at the final decree as at the time of his application for the appointment of a receiver, is considered good ground for granting the application.⁶

§ 763. **Quasi-public corporations.**— The duties to the public of some *quasi*-public corporations cause considerable variation in their treatment under foreclosure from that appropriate in the case of private parties and purely private corporations. This difference is especially marked in England, where it is said that mortgages under a contract pledging a railway as security can not interfere with its internal and parliamentary

¹ *Manning v. Norfolk &c. R. Co.*, 29 Fed. Rep. 838.

² *Russell v. East Anglian Ry. Co.*, 3 Macn. & G. 125, construing 8 Vic. ch. 16, §§ 42 and 44; *Howell v. Western R. Co.*, (1876) 94 U. S. 463. And a mortgagee or bondholder may take measures in chancery to protect his security before the money is payable. *Legg v. Mathieson*, 2 Giff. 71; *Wildy v. Mid-Hants Ry. Co.*, 16 Week. Rep. 409; *Browne & Theobald's Ry. Law*, 87.

³ *Mercantile Trust Co. v. Missouri &c. R. Co.*, 36 Fed. Rep. 221; s. c. 4

Ry. & Corp. L. J. 362, following *Chicago &c. R. Co. v. Fosdick*, 106 U. S. 47. *Acc. Central Trust Co. v. New York City &c. R. Co.*, 33 Hun, 513; *Tyson v. Weber*, 81 Ala. 470. *Cf. Hart v. Eastern Union Ry. Co.*, 7 Ex. 246; s. c. 8 Ex. 116; *Price v. Great Western Ry. Co.*, 16 Mees. & W. 244.

⁴ *Farmers' Loan & Trust Co. v. Green Bay &c. R. Co.*, 10 Biss. 203.

⁵ *Beach on Railways*, § 704, and cases there cited.

⁶ *Mercantile Trust Co. v. Missouri &c. Ry. Co.*, 36 Fed. Rep. 221.

powers of management as a "going concern," as a fruit-bearing tree, the produce of which is dedicated to secure and pay the debt. The earnings of the undertaking must be made available to satisfy the mortgage; but the mortgagees by seizing, or by calling upon the court to seize, the capital, or the lands, or the proceeds of sales of lands, or the stock of the undertaking, can neither prevent its completion, or reduce it to its original elements when it has been completed.¹ And when parliament, acting for the public interest, authorizes a railway company, and imposes duties of the most important kind, with powers to be exercised only by the company, the court can not, without parliamentary authority, make itself or its officer the hand to exercise those powers, even with the express agreement and request of the company.² Accordingly mortgagees of the "undertaking" can not break it up, nor, by bringing ejectment, deprive the company of that property by which the undertaking is carried on.³ Nor have they a right to foreclose and sell the property of the railway. They merely acquire a prior right to payment out of the net earnings of the undertaking.⁴ So also in America it is said that the large sovereign powers given by the State to railway corporations are granted and exercised only upon the theory that these public rights are to be used to promote the general welfare of the people of the commonwealth; and the people have an interest in the maintenance of the undertaking as a "going concern," which is not to be defeated by its creditors.⁵ Ac-

¹ Cairns, L. J. in *Gardner v. London &c. Ry. Co.*, (1867) L. R. 2 Ch. App. 201; *Munns v. Isle of Wight Ry. Co.*, L. R. 5 Ch. App. 414, and *Latimer v. Aylesbury &c. Ry.*, 9 Ch. Div. 385. The appointment of receivers of railways is now regulated by the Railway Companies Act of 1875, 38 & 39 Vic. ch. 31, making the act of 1867, 30 & 31 Vic. ch. 127, perpetual. The provisions of this act are discussed in *In re Beddgelert Ry. Co.*, W. N. (1871) 3; s. c. 19 W. R. 427; *In re Manchester & M. Ry. Co.*, *Ex parte Cambrian Ry. Co.*, 14 Ch. Div. 645; *In re Birmingham*

&c. Junction Ry. Co., 18 Ch. Div. 155; *In re Stafford & Uttoxeter Ry. Co.*, W. N. (1868) 113; *In re Southern Ry. Co.*, 5 L. R. (Ir.) 165.

² Cairns, L. J. in *Gardner v. London &c. Ry. Co.*, (1867) L. R. 2 Ch. App. 201.

³ *Myatt v. St. Helen's Ry. Co.*, 2 Q. B. 364; s. c. 2 Eng. Ry. Cas. 756.

⁴ *Gardner v. London &c. R. Co.*, L. R. 2 Ch. App. 201.

⁵ Beach on Railways, § 656, citing *Gates v. Boston &c. R. Co.*, (1885) 53 Conn. 333, 343; *Burnham v. Bowen*, (1884) 111 U. S. 776, 781; *Worcester v. Western R. Co.*, 4 Met.

cordingly the courts are very reluctant to appoint receivers to take charge of these *quasi*-public properties and decline to act unless clearly necessary to prevent a failure of justice.¹ It is in the application of this doctrine that the courts in England and in the United States differ. For example in Connecticut the principle was invoked to justify the overruling of the efforts of a minority to resist foreclosure and a subsequent reorganization for the purpose of continuing the property in legitimate use.²

§ 764. **Jurisdiction.**—As a general rule the court which first acquires jurisdiction of the *res*, or subject-matter, will retain jurisdiction until the end of the litigation, its possession and control of the property being exclusive of interference by other courts.³ A decree foreclosing a mortgage upon

564; *Railroad Commissioners v. Portland &c. R. Co.*, 63 Me. 269, 278, 279; s. c. 18 Am. Rep. 208. *Cf.* *Furness v. Caterham Ry. Co.*, 25 Beav. 614; s. c. 27 Beav. 358; *Myatt v. St. Helena Ry. Co.*, 2 Q. B. 364.

¹ *Beach on Railways*, § 699, citing *Sage v. Memphis &c. R. Co.*, 125 U. S. 361; *Railroad Commissioners v. Portland &c. R. Co.*, (1872) 63 Me. 269; s. c. 18 Am. Rep. 208; *Stevens v. Davison*, 18 Grat. 819; s. c. 98 Am. Dec. 692. And see, generally, *Overton v. Memphis &c. R. Co.*, 10 Fed. Rep. 866; *Meyer v. Johnston*, 58 Ala. 237; *Kelly v. Trustees &c.* 58 Ala. 489; *Milwaukee &c. R. Co. v. Soutter*, 2 Wall. 510; *Wallace v. Loomis*, 97 U. S. 146. A receiver will be appointed for a railroad only as an adjunct to the enforcement of the equitable rights of the parties, and never merely to manage the property at the instance of parties dissatisfied with its control. *American Loan & Trust Co. v. Toledo &c. Ry. Co.*, 29 Fed. Rep. 416, 420; *Beach on Receivers*, § 328. *Cf.* *Brandt v. Allen*, (1888) 76 Iowa, 50;

Jones v. Bank of Leadville, (Colo. 1888) 17 Pacif. Rep. 272; *People v. Albany &c. R. Co.*, 24 N. Y. 261; s. c. 82 Am. Dec. 295; *People v. Long Island &c. R. Co.*, 31 Hun, 127; *State v. Hartford &c. R. Co.*, 29 Conn. 538; *State v. West Wisconsin R. Co.*, 36 Wis. 466; *State v. Southern Minnesota R. Co.*, 18 Minn. 40.

² *Gates v. Boston &c. R. Co.*, (1885) 53 Conn. 333.

³ *Beach on Receivers*, §§ 22, 23, 348; *Buck v. Colbath*, 3 Wall. 334, 342; *Union Trust Co. v. Rockford &c. R. Co.*, 6 Biss. 197; *Conkling v. Butler*, 4 Biss. 22; *Bill v. New Albany &c. R. Co.*, 2 Biss. 390; *Andrews v. Smith*, 19 Blatchf. 100; *Wilmer v. Atlanta &c. R. Co.*, 2 Woods, 409; *Alden v. Boston &c. R. Co.*, 5 Bankr. Reg. 230; *Milwaukee &c. R. Co. v. Milwaukee &c. R. Co.*, 20 Wis. 165; s. c. 88 Am. Dec. 735; *State v. Marietta & Cincinnati R. Co.*, 35 Ohio St. 154; *Ohio &c. R. Co. v. Fitch*, 20 Ind. 498. *Cf.* *Jennings v. Philadelphia & Reading R. Co.*, 23 Fed. Rep. 569. But see *Thompson v. Van Vechten*, 3 Duer, 618.

corporate property in the federal circuit court for one district, is not invalid because a part of the property is situate in another district and State.¹ For the citizenship of the corporation rather than the situation of its property, determines the jurisdiction of the courts.² Accordingly a State court upon bill of foreclosure therein may order the sale and conveyance of property of the company which is situated or extends into another State.³ And the purchaser will take free from all liens except such as may exist under the laws of the other State upon the part of the property lying therein.⁴ Otherwise mortgages of bridges over boundary rivers and of railways running through more than one State, would be comparatively insecure, because the property as well as the franchise of the corporation owning them would be worthless if divided.⁵ So also a federal court will not at the instance of a mortgage creditor restrain the enforcement of a judgment of a State court, obtained before foreclosure or the appointment of a receiver, against the mortgaged railway company upon obligations incurred in the operation of its road.⁶ And again the rights of the judgment creditors of a railway company, who have established their liens in a State court, will not be prejudiced by a sale of the property in proceedings for foreclosure had in a federal court, they not having been joined as parties in the suit for foreclosure in the latter court.⁷ A further example of this principle is in a case where a federal court was

¹ *Muller v. Dows*, (1876) 94 U. S. 444; *McElrath v. Pittsburg &c. R. Co.*, 55 Pa. St. 189; *Blackburn v. Selma &c. R. Co.*, 2 Flip. 525; *Wilmer v. Atlantic &c. R. Co.*, 2 Woods, 409, 447; *Central Trust Co. v. Wabash &c. R. Co.*, 29 Fed. Rep. 620; *Atkins v. Wabash &c. R. Co.*, 29 Fed. Rep. 173; *Farmers' Loan & Trust Co. v. Chicago &c. R. Co.*, 27 Fed. Rep. 148; *Hurd v. Savannah &c. R. Co.*, 12 S. C. 314; *Randolph v. Wilmington &c. R. Co.*, 11 Phila. 102.

² *Muller v. Dows*, (1876) 94 U. S. 444; *Copeland v. Memphis &c. R. Co.*, 3 Woods, 659; *St. Louis National Bank v. Allen*, 2 McCrary, 94; s. c.

5 Fed. Rep. 552; *Penfield v. Chesapeake &c. R. Co.*, 29 Fed. Rep. 495.

³ *McElrath v. Pittsburg &c. R. Co.*, 55 Pa. St. 189; *Muller v. Dows*, (1876) 94 U. S. 444.

⁴ *Hand v. Savannah &c. R. Co.*, (1879) 12 S. C. 314. See also, *Taylor v. Atlantic &c. R. Co.*, 55 How. Pr. 275; s. c. 57 How. Pr. 26; *In re United States Rolling Stock Co.*, 55 How. Pr. 286; s. c. 57 How. Pr. 16.

⁵ *Muller v. Dows*, (1876) 94 U. S. 444.

⁶ *Eells v. Johnson*, 27 Fed. Rep. 327.

⁷ *Blair v. Walker*, 26 Fed. Rep. 73.

prayed to take ancillary jurisdiction in a case of foreclosure in an adjoining district of property lying in both, and the prayer was refused.¹ But, on the other hand, where during the pendency of a suit in a State court to enforce a statutory lien on mortgaged property, for work done and material furnished, foreclosure proceedings are instituted in the United States court, and a receiver is appointed and takes possession, and the plaintiff in the first suit continues to prosecute it without obtaining leave of the latter court, and finally obtains judgment, and is decreed to be entitled to a lien for the amount due him upon the property, the federal court will not entertain a petition to have that judgment declared a lien on the property in its receiver's hands, superior to the lien of a mortgage creditor.² The New York statute requiring an application for the appointment of a receiver to be made in the judicial district in which the principal office of the company is situated, does not apply to the case of a receiver appointed to take charge of mortgaged property pending foreclosure.³

§ 765. **Parties.**—Bondholders need not be made parties in a suit to foreclose a railroad mortgage given to trustees to secure the bonds;⁴ for the trustees represent the interests of all their bondholders, and their acts are binding upon them all.⁵ Accordingly, although suit may have been begun by the bondholders, the trustees, unless their interests are adverse, will be allowed to come in and take charge of the further conduct of the case.⁶ But any bondholder whose rights are endangered is entitled to be made a party to the action.⁷ So, also, on a bill to adjudge a mortgage and the bonds thereunder void, the bondholders have been held to be necessary

¹ *Mercantile Trust Co. v. Kanawha &c. Ry. Co.*, (1889) 39 Fed. Rep. 337; s. c. 6 Ry. & Corp. L. J. 283.

² *Blair v. St. Louis &c. Ry. Co.*, 25 Fed. Rep. 2.

³ *United States Trust Co. v. New York &c. Ry. Co.*, 35 Hun, 341.

⁴ *Vose v. Bronson*, (1867) 6 Wall. 452; *Shaw v. Little Rock &c. R. Co.*, 100 U. S. 605; *Chicago &c. R. Co. v. Howard*, 7 Wall. 392.

⁵ *Shaw v. Little Rock &c. R. Co.*,

(1879) 100 U. S. 605; *Credit Co. v. Arkansas Central R. Co.*, 5 McCrary, 30, 31; s. c. 15 Fed. Rep. 52, 53.

⁶ *Richards v. Chesapeake &c. R. Co.*, 1 Hughes, (U. S. C. C.) 28. The trustee of an income mortgage is a necessary party to a suit for an accounting. *Barry v. Missouri &c. R. Co.*, 22 Fed. Rep. 631.

⁷ *Ex parte De Betz*, 9 Abb. N. Cas. 246; *Anderson v. Jacksonville &c. R. Co.*, 2 Woods, 628.

parties.¹ The stockholders need not be made parties defendant, for a decree against the company is conclusive against them.² Upon the general principle that the sovereign can not be sued without his consent, a State which has indorsed the mortgage bonds need not be made a party to foreclosure proceedings.³ A temporary receiver appointed in proceedings instituted by the Attorney-General to dissolve a corporation on the ground of insolvency, is not a necessary party to a foreclosure suit brought by the mortgage creditors of the company; for as temporary receiver he is not vested with the title to the property of the corporation, and it is not divested of its property until final judgment of dissolution and the appointment of a final receiver.⁴

§ 766. **Holders of different liens as parties.**—Second mortgagees are not necessary parties to a foreclosure by the first mortgagees except for the purpose of cutting off the right of redemption, which the former would otherwise retain.⁵ And a second mortgagee, not a party to the bill of the first mortgagee, after sale and execution thereunder, can not have an injunction to restrain the sale, as his rights are unaffected.⁶ So also, in a suit by a junior mortgagee to foreclose a mortgage, prior mortgagees are not necessary parties;⁷ especially where the bill seeks only a foreclosure of the equity of redemption.⁸ For a sale in such a case would necessarily be made subject to the prior mortgages.⁹

¹ Appeal of Harrisburg &c. R. Co., (Pa. 1888) 15 Atl. Rep. 459, not officially reported.

² Chicago &c. R. Co. v. Howard, 7 Wall. 392.

³ Davis v. Gray, (1872) 16 Wall. 203; Young v. Montgomery &c. R. Co., 2 Woods, 606. Cf. Elliott v. Van Voorst, 3 Wall. Jr. 299, as to the federal government as a party in foreclosure proceedings.

⁴ Herring v. New York &c. R. Co., 105 N. Y. 340, 371; Beach on Railways, § 697.

⁵ Searles v. Jacksonville &c. R. Co., (1873) 2 Woods, 621.

⁶ Searles v. Jacksonville &c. R. Co., (1873) 2 Woods, 621.

⁷ Jerome v. McCarter, (1876) 94 U. S. 734; Hogan v. Walker, 14 How. 37; Rose v. Page, 2 Sim. 471; Richards v. Cooper, 5 Beav. 304; Delabere v. Norwood, 3 Swanst. 144.

⁸ Jerome v. McCarter, (1876) 97 U. S. 734; Gihon v. Belleville, 3 Halst. Eq. 531; Williamson v. Probasco, 4 Halst. Eq. 571.

⁹ Young v. Montgomery &c. R. Co., (1875) 2 Woods, 606; Bronson v. La Crosse &c. R. Co., 2 Wall. 283; Howard v. Milwaukee &c. R. Co., 7 Biss. 73.

And a decree in favor of junior mortgagees, even adjudging their lien to be a first lien, does not give them precedence over a prior lien of a party without notice.¹ But in a suit for foreclosure of a second mortgage on a railroad, where a receiver is asked, the first mortgagee is a proper party; for in that case the *res* in the hands of the court and subject to sale is the entire mortgaged property, and not merely the equity of redemption.² A junior mortgagee has a right to a receiver to collect the rents of the mortgaged premises for his benefit pending a suit to foreclose brought by a senior mortgagee, to which he is made a party.³ Prior mortgagees can be made parties only by service of process or voluntary appearance, but if they are represented by trustees who are parties, a notice calling upon them to present their claims to the master is effectual and the decree binds them.⁴

§ 767. **Intervention.**—Senior mortgagees will not be allowed to intervene in an action for the foreclosure of a junior

¹ Pittsburgh &c. R. Co. v. Marshall, (1877) 85 Pa. St. 187.

² Miltenberger v. Logansport &c. R. Co., (1882) 106 U. S. 286.

³ Beach on Railways, § 697, citing Washington &c. Ins. Co. v. Fleischauer, 20 Hun, 117. The common-law rule defining the rights of junior and senior mortgagees, where the first mortgagee is in possession, was early stated by Lord Eldon, as follows: "If a man has a legal mortgage, he can not have a receiver appointed; he has nothing to do but to take possession. If he has only an equitable mortgage, that is, if there is a prior mortgagee, then if the prior mortgagee is not in possession, the other may have a receiver without prejudice to his taking possession; but, if he is in possession you can not come here for a receiver; you must redeem him, and then in taking the accounts, he will not be allowed any sums that he may have paid over to the mortgagor after notice of the subsequent incumbrance." So long as anything is

due, in one case it was said, if even a sixpence is due, the receiver will be refused, and the question whether anything is due can not be tried on motion. But it should clearly appear that something is due, and if the accounts of the mortgagee are so incomplete that he can not determine definitely whether or not anything is due, the court will allow the motion to stand over in order to allow him to find out the amount, and if he fail to show any, the court may assume that nothing is due and act accordingly. Berney v. Sewell, 1 Jac. & W. 647; Rowe v. Wood, 2 Jac. & W. 553; Hiles v. Moore, 15 Beav. 175; Codrington v. Parker, 16 Ves. 469; Faulkner v. Daniel, 10 L. J. (N. S.) Ch. 33; Quinn v. Brittain, 3 Edw. Ch. 314; Bolles v. Duff, 35 How. Pr. 481; Boston & Providence R. Co. v. New York & N. E. R. Co., 12 R. I. 220; Norway v. Rowe, 19 Ves. 144; Chambers v. Goldwin, cited in 13 Ves. 377.

⁴ Young v. Montgomery &c. R. Co., (1875) 2 Woods, 606.

mortgage.¹ Nor can the shareholders intervene unless there be fraud or collusion on the part of the corporate officers having the management of the case.² Neither can unsecured creditors intervene in foreclosure proceedings.³ Thus in a suit to foreclose a railroad mortgage, the court being satisfied that money lent by a bank, an intervening creditor, at a time when the company was much embarrassed and shortly before the commencement of the suit, went into the general funds of the company, and not especially to the payment of interest, and that there was no fraud or deception on the part of the trustees, and no misuse of current income by the receiver of the road to the injury of the bank, held that the bank had only the rights of a general creditor in the distribution of the proceeds of the sale of the mortgaged property.⁴ But where a railroad and its entire property was mortgaged to secure an issue of bonds, and general creditors sued the company and threatened to attach rolling stock, and an outside party gave an indemnity bond under which he was compelled to pay the claim against the company, which in turn gave him a mortgage upon certain locomotives, upon foreclosure of the general mortgage he will be protected in his outlay, since it enabled the company to keep up as a going concern and resulted finally in supplying the receiver with means which he turned over to the purchasing bondholders.⁵ And in the case of rolling stock in use upon a railroad under a car-trust agreement, if it is retained and used by the receiver in a foreclosure suit, the owners may intervene in the foreclosure suit, and they will be awarded reasonable rent therefor upon the ground

¹ *Ex parte McHenry*, (1878) 9 Abb. 251; *Fosdick v. Schall*, 99 U. S. N. Cas. 256. 235.

² *Bronson v. La Crosse & Co. R. Co.*, 2 Black, 524; *Forbes v. Memphis & Co. R. Co.*, 2 Woods, 323. But see *Chouteau v. Allen*, 70 Mo. 290.

³ *Herring v. New York & Co. R. Co.*, (1887) 105 N. Y. 340, 370; *Stoute v. Lye*, 103 U. S. 66; *Condee v. Lord*, 2 N. Y. 269; s. c. 51 Am. Dec. 294; *Bronson v. La Crosse R. Co.*, 2 Black, 524.

⁴ *Penn v. Calhoun*, (1887) 121 U. S.

⁵ *Union Trust Co. v. Morrison*, (1888) 125 U. S. 591; *Fosdick v. Schall*, 99 U. S. 235; *Miltenberger v. Logansport R. Co.*, 106 U. S. 286; *Union Trust Co. v. Soutter*, 107 U. S. 591; *Burnham v. Bowen*, 111 U. S. 776; *Union Trust Co. v. Illinois & Co. R. Co.*, 117 U. S. 434; *Dow v. Memphis & Co. R. Co.*, 124 U. S. 652; *Sage v. Memphis & Co. R. Co.*, 125 U. S. 361.

that the use was for the benefit of the realty, and necessary for the continued operation of the railway as a "going concern," in the maintenance of which the public generally is interested.¹

§ 768. Foreclosure by bondholders.—If the trustees refuse or neglect to act at the request of the bondholders upon breach of the conditions of the mortgage, any bondholder may institute suit for himself and all who wish to come in with him.² So if the trustees are dead, the bondholders themselves may sue.³ In order to maintain their action, however, the bondholders must prove that they are *bona fide* holders and owners of bonds secured by the mortgage,⁴ and must show clearly that the trustees have neglected or refused to act upon a request properly made.⁵ In proceedings by the bondholders the trustees must be joined as parties defendant, and duly served with process.⁶ Where a corporation conveyed property to trustees to secure mortgage bonds, and before default, certain of the bondholders and one of the trustees instituted proceedings based on the insolvency of the corporation, and caused a judicial sale to be had; and afterwards the remaining trustees and bondholders objected to a confirmation of the sale, and demanded to be made parties to the proceedings, it was held that the sale should be set aside, and that the other bondholders should be made parties according to their request.⁷ If the mortgage is made directly to the bondholders by name, any one of them can bring his suit in foreclosure by joining all as parties.⁸

¹ Kneeland v. American &c. Co., (1890) 136 U. S. 89; Farmers' &c. Co. v. Chicago &c. R. Co., (1889) 42 Fed. Rep. 6.

² Webb v. Vermont Central R. Co., (1882) 20 Blatchf. 218, where the trustees had acquired adverse interests, Wilmer v. Atlanta &c. R. Co., 2 Woods, 447; Alexander v. Central &c. R. Co., 3 Dill. 487; Wutgen v. St. Paul &c. R. Co., 4 Hun, 529; March v. Eastern R. Co., 40 N. H. 548; s. c. 77 Am. Dec. 732; Mason v. York &c. R. Co., 52 Me. 82; Jessup v. City Bank, 14 Wis. 331.

³ Galveston &c. R. Co. v. Cowdrey, 11 Wall. 459.

⁴ Jessup v. City Bank, 14 Wis. 331.

⁵ Knapp v. Railroad Co., (1873) 20 Wall. 117; Galveston R. Co. v. Cowdrey, 11 Wall. 459; Campbell v. Railroad Co., 1 Woods, 368.

⁶ Wutgen v. St. Paul &c. R. Co., 4 Hun, 529; Morgan v. Kansas Pacific R. Co., 15 Fed. Rep. 55.

⁷ Coann v. Atlanta Cotton Factory Co., 14 Fed. Rep. 4.

⁸ Nashville &c. R. Co. v. Orr, (1873) 18 Wall. 471; Chicago &c. R. Co. v. Howard, 7 Wall. 392, holding, how-

§ 769. Respective rights of majority and minority bondholders.—It is often provided in bonds and mortgages that any bondholder may consider the principal due upon default in the payment of any coupon for a certain time, usually six months.¹ It is more usually provided in corporate mortgages that upon default in payments of interest the trustees shall enter and take possession of the property upon the request of a majority of the bondholders.² But none of the bondholders can appropriate the security to themselves or impair its value to the others.³ For each bondholder enters into contract relation with each and all of his co-bondholders. His right to appropriate the security in satisfaction of his bond in such lawful manner as he may choose, is modified by the same right in every other holder. His absolute right of control is limited not only by the express provisions of the bond and mortgage, but also in great measure by the peculiar nature and character of the security.⁴ And to allow a small minority of bondholders, representing a comparatively insignificant amount of the mortgage debt, in the absence of any pretense even of fraud or unfairness, to defeat the wishes of an overwhelming majority of those associated with them in the benefits of their common security, would be to ignore entirely the relation which bondholders, secured by a mortgage, bear to each other.⁵ It follows, therefore, that if there are differences of opinion among the bondholders as to what their interests require, it is not improper that the trustee should be governed by the voice of the majority, acting in good faith and without collusion.⁶ And of course where the mortgage pro-

ever, that he can not sue for himself and others who may choose to come in. He must name them as parties.

¹ *Gates v. Boston &c. R. Co.*, (1835) 53 Conn. 333.

² *Beekman v. Hudson River &c. Ry. Co.*, (1888) 35 Fed. Rep. 3; s. c. 4 Ry. & Corp. L. J. 220; *State v. Brown*, 64 Md. 199; *First National &c. Ins. Co. v. Salisbury*, (1881) 130 Mass. 303. Cf. 8 Vic. ch. 16, § 53. But these provisions have been held not to preclude the mortgage trustees from foreclosing in a proper case

without waiting for the request of the bondholders, which is a provision in addition to the usual rights of the trustee in his discretion to foreclose upon default. *First National &c. Ins. Co. v. Salisbury*, (1881) 130 Mass. 303.

³ *Jackson v. Ludeling*, (1874) 21 Wall. 616.

⁴ *Canada &c. R. Co. v. Gebhard*, 109 U. S. 534.

⁵ *Shaw v. Little Rock &c. R. Co.*, (1879) 100 U. S. 605.

⁶ *Shaw v. Little Rock &c. R. Co.*, (1879) 100 U. S. 605.

vides that the bonds may be considered due by any bondholder on default in payment of interest, a majority having availed themselves of the condition, a small minority should not be allowed to thwart their action by electing not to consider their bonds as due.¹ So, also, where suit was brought by a small minority of the bondholders, upon default in payment of interest, the principal debt having several years to run, it was held that dissenting bondholders should be allowed to purchase the bonds of those wishing to foreclose, and thereby put an end to the proceedings.² After a default has occurred, a majority of the bondholders may instruct the trustees to waive it, but an attempt on their part to waive future defaults and instruct the trustees to give an extension upon all the coupons for a number of years, so that the sums required for interest upon the bonds may be applied in improvements to the company's road, is illegal.³ And a dissenting bondholder may sue for the amount of his past-due coupons notwithstanding the fact that the majority in interest have waived the rights secured to them by the mortgage.⁴ There is no restriction upon the right of the coupon-holder to sue, without assent of a majority of the bondholders, except when advantage is sought to be taken of the default as advancing the date when the principal becomes due.⁵ The suit can in any event be sustained for interest due.⁶ And even though the mortgage deed expressly prohibit the trustees from declaring the principal due upon default in payment of an interest instalment and from entering upon the property or foreclosing for the principal sum before the maturity of the bonds, unless requested to do so by the holders of a majority of them, it has been decided that they may foreclose for a failure to pay interest at the request of a single bondholder.⁷

¹ *Gates v. Boston &c. R. Co.*, (1885) 53 Conn. 333; *Shaw v. Little Rock &c. R. Co.*, (1879) 100 U. S. 605, 612.

² *Tillinghast v. Troy &c. R. Co.*, (1888) 48 Hun, 420. In this case the bonds were above par in the market.

³ *McClelland v. Norfolk &c. R. Co.*, (1888) 110 N. Y. 469; s. c. 6 Am. St. Rep. 397.

⁴ *Manning v. Norfolk &c. R. Co.*, 29 Fed. Rep. 838.

⁵ *Beekman v. Hudson River &c. R. Co.*, (1888) 35 Fed. Rep. 3, 11.

⁶ *Beekman v. Hudson River &c. R. Co.*, (1888) 35 Fed. Rep. 3, 11; *Chicago &c. R. Co. v. Fosdick*, 106 U. S. 47.

⁷ *Farmers' Loan & Trust Co. v. Chicago &c. Ry. Co.*, 27 Fed. Rep. 146.

§ 770. **Of foreclosure for interest alone.**— Where a mortgage is security for interest as well as principal, it may be foreclosed on default in payment of the interest, in the absence of any special provision on that subject.¹ And the right to foreclose for default in payment of interest having been established, a receiver may be appointed at the instance of the bondholders.² Accordingly, where the interests involved demand a sale, upon a default in payment of interest, before maturity of the principal, the court may so decree, although such a course is not authorized by the terms of the mortgage,³ and even though the principal does not fall due upon default in payment of interest.⁴ So also stipulations in corporate mortgages for the sale of the property upon default in payment of interest, are construed to contemplate but one sale, and unless the property is capable of division without material injury, it must be sold in its entirety, although no part of the principal be yet due.⁵ But if the deed does not provide that the principal sum shall become due upon default in payment of interest, and the property is capable of division without material injury, the court may direct a sale of so much thereof as is sufficient to pay the interest, or it may order the property to be leased and the interest to be paid out of the rental arising therefrom.⁶ Or the decree may order the mortgaged property to be sold and the proceeds, after payment of costs and the interest then due, to be paid into court for the purpose of meeting future instalments of interest and the principal sum upon maturity.⁷ Thus where there is no provision, either in a bond or in the mortgage by which it is secured, or elsewhere, that the bond shall become due, or may be declared due, on the happening of some event prior to the date of maturity, it is error for a court

¹ *Mercantile Trust Co. v. Missouri &c. R. Co.*, (1888) 36 Fed. Rep. 221; s. c. 4 Ry. & Corp. L. J. 362.

² *Hopkins v. Worcester &c. Proprietors*, L. R. 6 Eq. 437; *Brassey v. New York &c. R. Co.*, 19 Fed. Rep. 663; *Williamson v. New Albany &c. R. Co.*, 1 Biss. 198, and *Tysen v. Wabash &c. Ry. Co.*, 8 Biss. 247; *American Loan & Trust Co. v. Toledo &c. R. Co.*, 29 Fed. Rep. 416.

³ *McLane v. Placerville &c. R. Co.*, 66 Cal. 606.

⁴ *Howell v. Western R. Co.*, (1876) 94 U. S. 463.

⁵ *Wilmer v. Atlantic &c. R. Co.*, 2 Woods, 447.

⁶ *Bardstown &c. R. Co. v. Metcalf*, 4 Met. (Ky.) 199; s. c. 81 Am. Dec. 541.

⁷ *Howell v. Western R. Co.*, (1876) 94 U. S. 463.

of equity to decree the unpaid balance of the bond to be due when in fact it has not matured, although the mortgaged property has been sold on foreclosure, and the proceeds applied to the payment of the interest and principal, on default of interest, as provided by the mortgage.¹ And if the intention is clear that the bonds were not to become due before the specified date of maturity, the proceeds of sale, after the satisfaction of the accrued amount, may be properly applied upon the outstanding liability.² But upon payment of the whole amount of interest due, the company may demand a surrender of its property after the trustees have entered, if there be nothing in the deed to the contrary and the principal is not yet due.³ The bondholders do not waive their right to consider the principal as due by accepting payment of a part of the interest coupons.⁴

§ 771. **Actions upon coupons.**—The owner of detached coupons may bring suit upon them although he is not interested in the bonds.⁵ And the bond need not be produced if the coupons be declared on properly.⁶ A count upon the coupon is all that is material, for production of the coupon at the trial will show its relation to the bond,⁷ as it contains all necessary information, that it is issued for interest due at a certain day and place on a bond, giving its number and date.⁸ But a recital in a general way of the bonds so as to bring into

¹ Ohio Central R. Co. v. Central Trust Co., (1890) 133 U. S. 83; s. c. 7 Ry. & Corp. L. J. 182.

² Ohio Central R. Co. v. Central Trust Co., (1890) 133 U. S. 83; s. c. 7 Ry. & Corp. L. J. 182; Chicago & C. R. Co. v. Fosdick, 106 U. S. 47, 68.

³ Union Trust Co. v. Missouri & C. Ry. Co., 26 Fed. Rep. 485.

⁴ Northampton National Bank v. Kidder, 106 N. Y. 221, 229; s. c. 60 Am. Rep. 443.

⁵ Kenosha v. Lamson, (1869) 9 Wall. 477; Thompson v. Lee County, 3 Wall. 327; Kennard v. Cass County, (1874) 3 Dill. 147. Accordingly *assumpsit* will lie upon un-

sealed coupons although the bonds to which they were originally attached were under seal. First National Bank v. Bennington, 16 Blatchf. 53.

⁶ Kenosha v. Lamson, (1869) 9 Wall. 477; Kennard v. Cass County, (1874) 3 Dill. 147.

⁷ Kenosha v. Lamson, (1869) 9 Wall. 477.

⁸ Kenosha v. Lamson, (1869) 9 Wall. 477. Therefore generally, in declaring upon coupons, they need only be identified by the number of the bond, the date, the amount, and time of payment. Kennard v. Cass County, 3 Dill. 147.

view the relation which the coupons originally held to them, is proper enough although unnecessary, and being by way of inducement or preamble only, does not make the suit one on the bonds instead of on the coupons.¹ But in a declaration upon income-bond coupons, it is necessary to allege and to prove the existence of net revenue.² The statutory limitation to the beginning of actions on coupons is the same as that on the bonds, and remains so even after they are detached.³ But the statute begins to run against coupons from the time they mature, although they remain attached to the bonds.⁴ They are barred by limitation from their own date, not that of the bond.⁵

§ 772. Receivers in foreclosure proceedings.—A receiver may be appointed either upon the application of the company itself,⁶ the shareholders⁷ or of creditors, whether secured or unsecured.⁸ But a court of equity will not appoint a receiver where the party applying therefor has an adequate remedy at law.⁹ And in making an appointment the court does not go

¹ *Kenosha v. Lamson*, (1869) 9 Wall. 477.

² *Corcoran v. Chesapeake &c. Canal Co.*, 1 MacA. 358.

³ *Jones on Corporate Bonds and Mortgages*, § 267; *Kenosha v. Lamson*, 9 Wall. 477; *Clark v. Iowa City*, 20 Wall. 583; *Koshkonong v. Burton*, 104 U. S. 668; *Lexington v. Butler*, 14 Wall. 282; *McCoy v. Washington Co.*, 3 Wall. Jr. 381.

⁴ *Amy v. Dubuque*, (1878) 98 U. S. 470.

⁵ *Clark v. Iowa City*, 20 Wall. 583; *Ferry v. Ferry*, 2 Cush. 92; *Huey v. Macon County*, (1888) 35 Fed. Rep. 481; s. c. 4 Ry. & Corp. L. J. 427; *City of Lexington v. Butler*, 14 Wall. 296; *Kenosha v. Lamson*, 9 Wall. 477; *Amy v. Dubuque*, 98 U. S. 470.

⁶ *Wabash &c. Ry. Co. v. Central Trust Co.*, 22 Fed. Rep. 272; *Central Trust Co. v. Wabash &c. Ry. Co.*, 29 Fed. Rep. 618, 623. See *Atkins v.*

Wabash Ry. Co., 29 Fed. Rep. 161, quoted in note 2, § 16, *supra*.

⁷ *Merryman v. Carroll &c. Co.*, 4 Ry. & Corp. L. J. 12; *Lawrence v. Greenwich Fire Ins. Co.*, 1 Paige, 587. See, also, *Sheppard v. Oxenford*, 1 Kay & J. 491; *Evans v. Coventry*, 5 De G., M. & G. 911.

⁸ *Vide supra*, § 715, as to appointment of receivers at instance of unsecured creditors; and as to appointment at instance of mortgagees, *vide* § 762.

⁹ *Beach on Railways*, § 700, citing *Milwaukee &c. R. R. Co. v. Soutter*, 2 Wall. 510, 523; *Winkler v. Winkler*, 40 Ill. 179; *Mullen v. Jenkins*, 1 Stockt. 192; *Sherman v. Clark*, 4 Nev. 138; s. c. 97 Am. Dec. 516; *Coughron v. Swift*, 18 Ill. 414; *Poage v. Bell*, 3 Rand. 586; *Webster v. Couch*, 6 Rand. 519; *Wooden v. Wooden*, 2 Green's Ch. 429; *Parmly v. Tenth Ward Bank*, 3 Edw. Ch.

into the merits of the case generally.¹ For a receiver is a ministerial officer of a court of chancery, appointed as an indifferent person between the parties to a suit merely to take possession of and preserve, *pendente lite*, the fund or property in litigation, when it does not seem equitable to the court that either party should have possession or control of it.² He holds the property for the benefit of all the parties interested.³ His title and possession is that of the court,⁴ and any attempt to disturb his possession is contempt and punishable accordingly.⁵ Under modern statutes the receiver's powers are now

395; *Sollory v. Leaver*, L. R. 9 Eq. 23; *Cremen v. Hawkes*, 2 Jones & Lat. 674; *Corey v. Long*, 43 How. Pr. 497; *Speights v. Peters*, 9 Gill, 476; *Morrison v. Buckner*, Hemp. 442; *Rice v. St. Paul & Pacific R. Co.*, 24 Mian. 464.

¹ *Skinner Co. v. Irish Soc.*, 1 Mylne & Cr. 162; *Conro v. Gray*, 4 How. Pr. 166.

² *Beach on Railways*, § 695, citing *Wyatt's Prac. Reg.* 335; *Chautauqua Bank v. White*, 6 Barb. 584; *Portman v. Mills*, 8 L. J. (N. S.) Ch. 161; *Delaney v. Mansfield*, 1 Hogan, 234; *Booth v. Clark*, 17 How. 322; *Green v. Bostwick*, 1 Sandf. (N. Y.) Ch. 185; *Skinner v. Maxwell*, 66 N. C. 45; s. c. 68 N. C. 400; *Battle v. Davis*, 66 N. C. 252; *Coburn v. Ames*, 57 Cal. 201; *Hunt v. Wolfe*, 2 Daly, 303; *Corey v. Long*, 43 How. Pr. 497; s. c. 12 Abb. Pr. (N. S.) 427; *Devendorf v. Dickinson*, 21 How. Pr. 275; *Ellicott v. Warford*, 4 Md. 80; *Hooper v. Winston*, 24 Ill. 353; *Kaiser v. Kellar*, 21 Iowa, 95; *Iddings v. Bruen*, 4 Sandf. Ch. 417; *In re Burke*, 1 Ball & B. 74; *Fairfield v. Weston*, 2 Sim. & S. 98; *Bryan v. Cormick*, 1 Cox, 422; *Field v. Jones*, 11 Ga. 413; *Broad v. Wickham*, 1 Smith's Ch. Pr. 500; *Angel v. Smith*, 9 Ves. 335; *Curtis v. Leavitt*, 10 How. Pr. 481; *Lottimer*

v. Lord, 4 E. D. Smith, 183; *Davis v. Marlborough*, 2 Swanst. 125; *Verplanck v. Mercantile Insurance Co.*, 2 Paige, 438, 452; 1 *Grant's Chancery Practice*, (2nd ed.) 298; *Beach on Receivers*, § 2.

³ *Skip v. Harwood*, 3 Atkins, 564; *In re Colvin*, 3 Md. Ch. 278; *Ellicott v. Warford*, 4 Md. 80; *Iddings v. Bruen*, 4 Sandf. Ch. 417; *Beach on Receivers*, § 4, citing *First Nat. Bank v. Barnum Wire & Iron Works*, (1886) 60 Mich. 489; s. c. (1885) 58 Mich. 315; *Delaney v. Mansfield*, 1 Hog. 234.

⁴ *De Visser v. Blackstone*, 6 Blatchf. 235; *Robinson v. Atlantic & Great Western Ry. Co.*, 66 Pa. St. 160; *Angel v. Smith*, 9 Ves. 335; *Ohio & C. R. Co. v. Fitch*, 20 Ind. 498; *Ellicott v. Warford*, 4 Md. 80; *Albany City Bank v. Schermerhorn*, 9 Paige, 372. *Cf. Covell v. Heyman*, 111 U. S. 176.

⁵ *Walling v. Miller*, 108 N. Y. 173; s. c. 2 Am. St. Rep. 400, annotated; *Beverley v. Brooke*, 4 Grat. 187, 211; *Noe v. Gibson*, 7 Paige, 513; *Hull v. Thomas*, 3 Edw. Ch. 236; *De Visser v. Blackstone*, 6 Blatchf. 235; *Secor v. Toledo & C. Ry. Co.*, 7 Biss. 513; *King v. Ohio & C. R. Co.*, 7 Biss. 529; *Spinning v. Ohio Life Ins. & Trust Co.*, 2 Disney, 368; *Vermont & Canada R. Co. v. Vermont Cen-*

more extensive than formerly.¹ He may sue and be sued;² may collect unpaid subscriptions to the capital stock;³ may enter into new contracts under authority of the court, to conserve the property;⁴ may employ counsel, and is entitled to compensation for his own and his counsel's services.⁵

§ 773. **Defenses.**—No other or further defenses are allowed in an action to foreclose a mortgage to secure negotiable corporate bonds which were transferred to a *bona fide* holder for value, than would be allowed in an action at law upon other like negotiable instruments.⁶ Accordingly a bill to foreclose a mortgage executed to a life insurance company to secure payment of a bond, is not subject to demurrer for failing to show affirmatively the capacity of the company to lend money

tral R. Co., 46 Vt. 792; *Langford v. Langford*, 5 L. J. (N. S.) Ch. 60; *Broad v. Wickham*, 4 Sim. 511; *Skip v. Harwood*, 3 Atk. 564; *Anon-ymous*, 2 Mod. 499; *Beach on Receivers*, § 237.

¹ *Verplanck v. Mercantile Ins. Co.*, 2 Paige, 453; *Hooper v. Winston*, 24 Ill. 363; *Grant v. City of Davenport*, 18 Iowa, 194; *Davis v. Gray*, 16 Wall. 219; *Yeager v. Wallace*, 44 Pa. St. 294; *Runyon v. Farmers' & Mechanics' Bank*, 3 Green, (N. J.) 480; *Cooney v. Cooney*, 65 Barb. 524.

² *Beach on Railways*, §§ 735, 736, citing *Coope v. Bowles*, 28 How. Pr. 10; s. c. 42 Barb. 87; *Griffin v. Long Island R. Co.*, 102 N. Y. 449; *Curtis v. McIlhenny*, 5 Jones Eq. (N. C.) 290.

³ *Beach on Receivers*, §§ 669, 670; citing *Dayton v. Borst*, 31 N. Y. 435; *Nathan v. Whitlock*, 9 Paige, 152; *Frank v. Morrison*, 58 Md. 423; *Cutting v. Damerel*, 88 N. Y. 410; *Mean's Appeal*, 85 Pa. St. 293. But he has no power to enforce statutory liabilities. *Farnsworth v. Wood*, 91 N. Y. 308. And he has no greater power than the corporation had to

collect subscriptions. *Billings v. Robinson*, 94 N. Y. 415; s. c. 28 Hun, 122. *Cf. Cleveland v. Burnham*, 55 Wis. 598.

⁴ But he can not bind the trust by contract without the authority of the court. *Lehigh Coal & Co. v. Central R. Co.*, 35 N. J. Eq. 426, 429. See also *Beach on Receivers*, §§ 257, 361. *Cf. In re Louisiana & Co. Deposit Co.*, (1888) 40 La. Ann. 514; *Cowdry v. The Railroad*, 1 Wood, 331, 336, where it is said that in practice it has been found that the receiver must be allowed a certain discretion in matters of detail in operating railroads, in order that he may discharge his duties to the best advantage. The court has power, on consulting the receivers, and without notice to the mortgagees, to order the lease of another road which is found necessary to the profitable management of the mortgaged property. *Mercantile Trust Co. v. Missouri, K. & T. Ry. Co.*, (1890) 41 Fed. Rep. 8.

⁵ *Beach on Railways*, §§ 747, 748.

⁶ *Kenicott v. Wayne County*, (1872) 16 Wall. 452; *Carpenter v. Longan*, 16 Wall. 271.

and take mortgages,¹ nor because it was not shown that the agent of a foreign insurance company had not complied with an act requiring him to procure a certificate of authority from the auditor before transacting any business of insurance.² So also on foreclosure of a railroad mortgage, neither the minority stockholders, nor any one not a stockholder at the time of the illegal transactions, can maintain a bill alleging in defense of the foreclosure the mismanagement of the affairs of the corporation in the interest of the principal bondholder and stockholder, and usury in the negotiation of the bonds, where no demand upon, or refusal by, the directors or stockholders to make the defense is averred, and no excuse for not doing so is made, except that the officials are in collusion with the persons seeking the foreclosure.³

§ 774. The decree of foreclosure.—The proceeding for a foreclosure is in the nature of a remedy *in rem* and not *in personam*, and the trustees have no right to enforce the bonds in any way except that provided in the mortgage, and are confined to realizing upon the security thereof.⁴ In the State courts they are not entitled to a personal judgment against the company for any deficiency that may remain after sale and application of the trust property.⁵ And in an action to foreclose mortgages given to secure advances, it is error to include in the judgment a sum sufficient to satisfy advances in excess of the amount of the mortgages.⁶ But the federal equity rule provides that in suits in equity for the foreclosure of mortgages, "a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales." Yet this does not authorize a deficiency decree, unless the bill shows that the amount is actually due.⁷ A decree

¹ *Boulware v. Davis*, (Ala. 1890) 8 Ry. & Corp. L. J. 412; *Alabama Gold Life Ins. Co. v. Central &c. Assoc.*, 54 Ala. 73.

² *Boulware v. Davis*, (Ala. 1890) 8 Ry. & Corp. L. J. 412.

³ *Alexander v. Searcy*, (1889) 81 Ga. 536.

⁴ *Welsh v. St. Paul &c. R. Co.*, (1879) 25 Minn. 314, 323.

⁵ *Welsh v. St. Paul &c. R. Co.*, (1879) 25 Minn. 314, 323.

⁶ *McComb v. Barcelona Apartment Assoc.*, (1890) 10 N. Y. Supl. 546; *McComb v. Cordova Apartment Assoc.*, (1890) 10 N. Y. Supl. 552.

⁷ *Ohio &c. R. Co. v. Central Trust Co.*, (1890) 133 U. S. 83; s. c. 7 Ry. & Corp. L. J. 182, construing Equity Rule, No. 92.

upon suit for default in interest payments, should declare the fact, nature and extent of the default which constitutes the breach of the condition of the mortgage, and the amount then due, a substantial error in which will vitiate the proceedings, and allow a reasonable time for payment; upon which further proceedings will be suspended until default again occurs.¹ The decree in foreclosure proceedings in which a railway is to be sold, should name an upset price sufficiently large to cover costs, all allowances made by the court, receiver's certificates and interest, liens prior to the bonds, amounts diverted from the earnings, and all undetermined claims which will be settled before the confirmation and sale.² And where a trustee for bondholders forecloses, and one of the bondholders has had the full amount of his bonds guarantied by the others, it is error, against his objection, for the court to direct the trustee to bid in the property for the full amount of all the bonds.³ It is proper to make a decree of sale subject to the rights and equities of parties to the suit under liens or judgments claimed by them, and to reserve those rights for further adjudication.⁴ In strict foreclosure a decree for a sale and for the enforcement of the agreement for purchase contained in the deed, is appropriate under the prayer for general relief.⁵ A foreclosure of all of several mortgages on railroad property, and a sale of the property entire, will not be ordered by one decree of the court.⁶

§ 775. **Binding effect of the decree.**— Although a decree entered by consent of the parties in interest may be set aside at any time before it is executed,⁷ one which has been entered in the usual course of judicial proceedings, after a trial of the cause, can not be vacated except upon the ground of fraud and circumvention.⁸ It is of binding effect upon all the par-

¹ *Chicago &c. R. Co. v. Fosdick*, (1882) 106 U. S. 47; *Howell v. Western R. Co.*, 94 U. S. 463.

⁵ *Sage v. Central R. Co.*, (1878) 99 U. S. 334.

² *Blair v. St. Louis &c. R. Co.*, 25 Fed. Rep. 232.

⁶ *Wabash &c. Ry. Co. v. Central Trust Co.*, 22 Fed. Rep. 138.

³ *Sanxey v. Iowa City Glass Co.*, (1886) 63 Iowa, 707.

⁷ *Union Bank v. Marin*, 3 La. Ann. 54; *Vermont &c. R. Co. v. Vermont Central R. Co.*, 50 Vt. 500; *Wadhams v. Gay*, 73 Ill. 415.

⁴ *Sage v. Central R. Co.*, (1878) 99 U. S. 334.

⁸ *Leavenworth County v. Chicago*

ties in interest who had or are affected with notice, and can not be collaterally attacked.¹ And a judgment in a suit against the mortgagee trustees is binding upon the bondholders, unless they can show fraud or connivance on the part of their trustees.² Accordingly underlying bondholders represented in the suit by their trustees, can not after the sale and partial execution of the contract attack the disposition of the earnings prior to the decree and change the rights of the purchasers.³ So also the purchasers at foreclosure sale, who are not required to pay an amount in excess of their bid, have no appealable interest in decrees adjudging to whom payment should be made.⁴ Nor

&c. Ry. Co., (1885) 25 Fed. Rep. 219; *Matthews v. Murchison*, 15 Fed. Rep. 691; *Graham v. Boston &c. R. Co.*, (1885) 118 U. S. 161; *Ward v. Montclair R. Co.*, 26 N. J. Eq. 260. A bill by second mortgagees for a rescission of a foreclosure sale is demurrable where there is no allegation of actual fraud, or that the property was sold for less than its value, nor offer to redeem. *Robinson v. Iron Ry. Co.*, (1890) 135 U. S. 522. The mortgage trustees are indispensable parties to suits to set aside the foreclosure. *Ribon v. Chicago &c. R. Co.*, 16 Wall. 446; *Meyer v. Utah &c. R. Co.*, 3 Utah, 280. Cf. *Thayer v. Life Assoc.*, 112 U. S. 720; *Evans v. Texas*, 11 Biss. 178; *Mitchell v. Tillotson*, 12 Fed. Rep. 738. An action to set aside the foreclosure is not barred by the previous refusal to make the suing shareholders parties, (*Tazewell County v. Farmers' &c. Co.*, 12 Fed. Rep. 752) for it is not a continuance of the original proceedings. *Pacific R. Co. v. Missouri Pacific R. Co.*, 3 Fed. Rep. 772. And when the decree is vacated, the complainant is placed in his former position. *Osborn v. Michigan &c. R. Co.*, 2 Flip. 503.

¹ *Graham v. Boston &c. R. Co.*, (1885) 118 U. S. 161; *Appeal of Huston*, (1889) 127 Pa. St. 620; *Herring*

v. New York &c. R. Co., (1887) 105 N. Y. 341, 371; *Grignon v. Astor*, 2 How. 319. But a decree is not binding upon parties without notice. *Pittsburg &c. R. Co. v. Marshall*, 85 Pa. St. 187; *Beach on Railways*, § 687, saying that a decree is final as between the parties with respect to the questions thereby decided or which might have been brought up in the suit, and those matters can not be again brought in issue between the same parties, unless it appear that the successful party has wrongfully prevented the other party from presenting his case fully; and citing *Brooks v. O'Hara Bros.*, 2 McCrary, 644; *Aurora City v. West*, 7 Wall. 82, 102; *Vermont &c. R. Co. v. Vermont Central R. Co.*, 50 Vt. 500; *Woods v. Pittsburgh &c. R. Co.*, 99 Pa. St. 101; *Wood's Ry. Law*, 1636; 2 *Taylor on Evidence*, § 1513.

² *Campbell v. Railroad Co.*, 1 Woods, 368. *Acc. Huntington v. Little Rock &c. R. Co.*, 16 Fed. Rep. 906, where the bondholders had been heard from time to time in the suit.

³ *Central Trust Co. v. Wabash R. Co.*, 30 Fed. Rep. 332.

⁴ *Central Trust Co. v. Grant Locomotive Works*, (1890) 135 U. S. 207; s. c. 7 Ry. & Corp. L. J. 502; *Stuart v. Gay*, 127 U. S. 518.

can they appeal from a decree of sale subject to specified liens.¹ And in this case the sufficiency of the proceedings in the foreclosure suit prior to the sale can not be questioned.² But the judgment in an action on coupons does not bar the same parties in action upon other coupons from the same bonds.³ And under a rule providing that where the bill is taken *pro confesso* the case may be proceeded with *ex parte*, and the matter of the bill may be decreed by the court, the defendant is not precluded on appeal from contesting the sufficiency of the bill, or from insisting that the averments in it do not justify the decree, although he can not question the evidence.⁴

§ 776. Redemption.—At any time prior to the confirmation of the sale under the decree, the mortgagor, by bringing into court the amount then due and costs, will be allowed to redeem.⁵ Where a trustee enters under a mortgage in default and manages the property, the corporation and stockholders may, on bill to redeem, have an accounting and hold him as a trustee for the corporation as well as of the bondholders.⁶

¹ *Swann v. Wright*, 110 U. S. 590, 601.

² *Robinson v. Iron Ry. Co.*, (1890) 135 U. S. 522.

³ *Town of Enfield v. Jordan*, 119 U. S. 680.

⁴ *Ohio &c. R. Co. v. Central Trust Co.*, (1890) 133 U. S. 83; s. c. 7 Ry. & Corp. L. J. 182.

⁵ *Chicago &c. R. Co. v. Fosdick*, (1882) 106 U. S. 47. "While the parties to this suit were fiercely litigating the amount of the mortgage debt and questions of fraud in the origin of that debt, the appointment, or the discharge, of a receiver for the mortgaged property very properly belonged to the discretion of the court in which the litigation was pending. But when those questions had been passed upon by the circuit court, and by this court also on appeal, and the amount of the debt definitely fixed by this court, the right of the defendant to pay that sum, and have

a restoration of his property by discharge of the receiver, is clear, and does not depend on the discretion of the circuit court. It is a right which the party can claim, and if he shows himself entitled to it on the facts in the record, there is no discretion in the court to withhold it. A refusal is error — judicial error — which this court is bound to correct when the matter, as in this instance, is fairly before it." *Milwaukee &c. R. Co. v. Soutter*, 2 Wall. 510, 521. Where, on hearing, a receiver is discharged, and the land in his possession restored to those from whom he received it, the rents which accrued while he held it should be returned to those who would have taken them if he had not interfered, even though they be insolvent. *Caswell v. Bunch*, (1888) 77 Ga. 504.

⁶ *Ashuelot R. Co. v. Elliott*, (1874) 57 N. H. 397.

§ 777. **The sale.**—It is with the mortgage trustees to elect whether the sale shall be made under a decree pending an appeal, and to choose the time therefor; and they will not be compelled by *mandamus* to have the property sold.¹ Accordingly, where the property is depreciating and becoming incumbered with receivers' certificates, a sale will not be postponed at the request of a minority interest contrary to the judgment of the trustees, and the decree may order the sale of the whole property together, subject to settlement of conflicting rights after the sale.² Although the court ordering the sale of corporate property will take the responsibility, if necessary, of delaying a sale to await a better condition of the finances and business of the company; yet where the increasing prosperity would require several years to pay the interest already due, and there is no guaranty that the prosperity will continue, the court will not postpone the sale.³ Where provision was made in a deed of trust, executed by a railway company to secure its bonds, for a sale in case of a default in payment of any of its bonds, and it was further made the duty of the trustees, under such circumstances, to sell upon the request of a majority in interest of the bondholders, the court refused to postpone the sale until the number of bonds due could be determined.⁴ And as to sale in parcels, where there are several separate properties to be sold it is proper to put up for sale each of them separately and then all together, and if the highest bid for the whole in gross exceeds the aggregate of the highest separate bids, to strike off and sell the entirety to the person making the bid.⁵ In case the proceeds of a foreclosure sale is less than the full face value of the series of bonds, each bondholder takes a part equal to the proportion between the amount of his bond and that of the whole series.⁶ For all the bonds secured by a mortgage are deemed to have been issued at the same time, and there is no priority in favor of the holders of the bonds bearing the lower num-

¹ *Farmers' &c. Co. v. Central R. Co.*, (1877) 4 Dill. 533.

² *First National Bank v. Shedd*, (1886) 124 U. S. 74, 86.

³ *Duncan v. Atlantic &c. R. Co.*, 4 Hughes, 125.

⁴ *State v. Brown*, 64 Md. 199.

⁵ *Union Trust Co. v. Illinois &c. R. Co.*, (1885) 117 U. S. 435, 474.

⁶ *Barry v. Missouri &c. R. Co.*, (1887) 34 Fed. Rep. 829; s. c. 4 Ry. & Corp. L. J. 198; *Hodges' Appeal*, 84 Pa. St. 359; *Brinkerhoff v. Lansing*, 4 Johns. Ch. 65; *Pomroy v.*

bers.¹ Accordingly in the case of an invalid power of sale in the deed under which the mortgaged property was sold, the proceeds must be applied to the payment of the debt to each and all of the bondholders alike.² And the proceeds are to be divided in proportion to the full value of the bonds without regard to the amount which their holders may have paid for them.³ But where a person holds bonds merely as collateral for a debt due him from the corporation, he is entitled to receive in the distribution only the amount of his debt.⁴ The surplus after paying the mortgage debt is to be applied to the other liens upon the railway.⁵ And, generally, on a sale for default in interest, the proceeds will be applied, first to the arrears of interest, then to the mortgage debt, then to the junior incumbrances, according to their respective priority of lien, and the surplus to the mortgagor.⁶ If the debenture holder has been paid out of the judgment he can not be brought back and treated as a trustee.⁷

Rice, 16 Pick. 22; *Watkins v. Hill*, 8 Pick. 522; *Dana v. Binney*, 7 Vt. 168; *Jesup v. City Bank*, (1861) 14 Wis. 331; *Ackerson v. Lodi & C. R. Co.*, (1877) 542.
¹ *Stanton v. Alabama & C. R. Co.*, 392.
² *Woods*, 523.
³ *Mason v. York & C. R. Co.*, (1861) 52 Me. 82.
⁴ *Duncomb v. New York & C. R. Co.*, 84 N. Y. 190.

⁵ *Rice's Appeal*, (1875) 79 Pa. St. 168; *Jesup v. City Bank*, (1861) 14 Wis. 331; *Ackerson v. Lodi & C. R. Co.*, (1877) 542.
⁶ *Railroad Co. v. Howard*, 7 Wall. 392.
⁷ *Chicago & C. R. Co. v. Fosdick*, (1882) 106 U. S. 47.
⁸ *Fontaine v. Carmathen Ry. Co.*, 5 Eq. 316, 324.

CHAPTER XXXIX.

DISSOLUTION AND REORGANIZATION.

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| <p>§ 778. Introductory.</p> <p>779. Statutory provisions respecting dissolution.</p> <p>780. Dissolution by lapse of time.</p> <p>781. Dissolution by the voluntary act of the corporation — Surrender.</p> <p>782. Dissolution by court of equity.
(a) At instance of creditors.</p> <p>783. (b) At instance of shareholders.</p> <p>784. (c) Grounds for a winding-up order.</p> <p>785. Abatement of actions upon dissolution.</p> <p>786. Receivers for dissolved corporations.</p> <p>787. Survival of choses in action, etc.</p> | <p>§ 788. Enforcement of creditors' claims after dissolution.</p> <p>789. Distribution of assets among shareholders.</p> <p>790. Reversion and escheat of property to grantor and to the State.</p> <p>791. Reorganization.</p> <p>792. Method of effecting reorganization — Statutory regulations.</p> <p>793. Obligations and rights of the parties to the reorganization agreement.</p> <p>794. The same subject continued.</p> <p>795. Transmission of property rights and franchises.</p> <p>796. Liability of the new company.</p> <p>797. The same subject continued.</p> |
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§ 778. **Introductory.**—The old common-law rule that a corporation might be dissolved by the death of all its members, is inapplicable to modern companies having capital stock divided into shares capable of transfer and transmission.¹ There are many circumstances which, while they may constitute grounds for dissolution at the suit of the State, the corporate creditors, or shareholders, do not of themselves work a dissolution.² The refusal by one of the two persons constituting a

¹ *Boston &c. Manuf. Co. v. Langdon*, 24 Pick. 49, 52; s. c. 35 Am. Dec. 292; *Russell v. McLellan*, 14 Pick. 63, 69. *Cf.* *Chesapeake &c. Canal Co. v. Baltimore &c. R. Co.*, 4 Gill & J. 1, 121.

² *E. g.*, the voluntary discontinuance of business. *Nimmons v. Tappan*, 2 Sweeney, 652; *Mickles v. Rochester City Bank*, 11 Paige, 118;

s. c. 42 Am. Dec. 103; *Troy &c. R. Co. v. Kerr*, 17 Barb. 581; *Attorney-General v. Bank of Niagara*, Hopk. Ch. 354. Nor the mere non-user of its franchises. *Russell v. McLellan*, 14 Pick. 63; *Brandon Iron Co. v. Gleason*, 24 Vt. 228; *Enfield Toll Bridge Co. v. Connecticut River Co.*, 7 Conn. 28, 47. *Cf.* *Pennsylvania &c. Canal Co. v. Commissioners of Portage Co.*, 27

corporation, to be longer bound by an agreement to share the expenses and profits equally, does not work a dissolution. To a suit brought by one for labor done after such an abrogation, the corporation must be made a party.¹

§ 779. Statutory provisions respecting dissolution.—The dissolution of corporations is, in most States, subject to statutory regulation, in which the methods of ending corporate life and settling corporate affairs are fixed with a greater or less degree of detail.² In England, an act has recently been

Ohio St. 22; *Rorke v. Thomas*, 36 N. Y. 559, 563; *Hollingshead v. Woodward*, 35 Hun, 410; *Allen v. New Jersey Southern R. Co.*, 49 How. Pr. 14; *Kansas City Hotel Co. v. Sauer*, 65 Mo. 279, 288; *Chouteau Ins. Co. v. Floyd*, 74 Mo. 286, 290; *State National Bank v. Robidoux*, 57 Mo. 446; *Moseby v. Burrow*, 52 Tex. 396; *State v. Barron*, 58 N. H. 370; *Harris v. Nesbit*, 24 Ala. 398; *Baptist Meeting-House v. Webb*, 66 Me. 398; *Rollins v. Clay*, 33 Me. 132. *Cf. In re Jackson Marine Ins. Co.*, 4 Sandf. Ch. 559; *Conro v. Gray*, 4 How. Pr. 166. See also N. Y. Rev. Stat. 463, 464, §§ 38, 56. Nor by the acquisition of all its stock by one person. *Newton Manuf. Co. v. White*, 42 Ga. 159; *Swift v. Smith*, 65 Md. 428; s. c. 57 Am. Rep. 336; *England v. Dearborn*, 141 Mass. 590; *Hopkins v. Roseclare & Co.*, 72 Ill. 373; *Button v. Hoffman*, 61 Wis. 20; s. c. 50 Am. Rep. 131; *Sharp v. Dawes*, 46 L. T. Q. B. 104. Nor is the company dissolved by being enjoined from carrying out the objects for which it was created. *Kincaid v. Dwinelle*, 59 N. Y. 548. See *Sanborn v. Lefferts*, 58 N. Y. 179. Companies duly incorporated by the legislature of Georgia under the constitution of 1868 did not forfeit their privileges by failing to organize until after the adoption of the constitution of 1877, there being

no provision of law to that effect. *Atlanta v. Gate City & Co.*, 71 Ga. 106; *Beach on Railways*, § 587. A street railroad company does not forfeit its charter by requiring its employes to work more than ten hours a day, in violation of Laws N. Y. 1887, ch. 529, which provides that "it shall be a misdemeanor for any officer or agent of any such corporation [street railway company] to exact from any of its employes more than ten hours' labor" per day. *People v. Atlantic Ave. R. Co.*, (1890) 10 N. Y. S. 907.

¹ *McKay v. Beard*, 20 S. C. 156.

² New York, 1 Revised Statutes, 600; 2 Revised Statutes, 461, 484, §§ 39-41, §§ 1784-1796, 2419-2431. In 1890 the general statutes of New York were revised by the Commissioners of Statutory Revision and passed by the Legislature. See chapters 563-567 inclusive of the laws of 1890. See also *The New Corporation Laws of the State of New York*, by Frank White, with annotations and references by Frank White and Edward J. Graham. *People v. Central City Bank*, 53 Barb. 412; *In re Pyrolusite Manganese Co.*, 29 Hun, 429; *In re Dubois*, 15 How. Pr. 7; s. c. *sub nom. In re Westchester Iron Co.*, 6 Abb. Pr. 386, notes; *Fisher v. World & Co. Ins. Co.*, 15 Abb. Pr. N. S. 363; *Mooney v. British & Co. Ins. Co.*

passed — known as the “Directors Liability Act 1890,” in which provision is made for the procedure to be followed in winding up corporations at considerable length.¹ The New Jersey statute provides for the dissolution of corporations and for the closing up of their business by the directors as trustees, and authorizes the chancellor to interpose and appoint a receiver, or to continue the directors as trustees; but it is held that the chancellor’s power of interference is a discretionary power, to be exercised only on good cause shown.² The Pennsylvania act regulating banks and establishing a system for winding up their affairs, does not apply to savings and deposit banks, but only to banks of issue.³

§ 780. Dissolution by lapse of time.—Where the charter of a corporation, or the general law under which it is organized, fixes the term for the existence of the corporation, it will, upon the expiration of the term, become *ipso facto* dissolved, and the assets must be distributed if any one of the members insists upon it.⁴ Thus if the constitution of a building association provides that it shall proceed to close when the unsold stock is worth fifty *per cent.* premium, it can not, after that time has come, defer closing in prospect of a further advance in the value of its real estate, and meanwhile compel stockholders to keep paying dues.⁵ The business of a

9 Abb. Pr. N. S. 103; Ohio, Act of May 1, 1852; Ill. Rev. Stat. 577, § 25; Iowa Code, § 1074; Ala. Code, § 1775 *et seq.*; *In re Franklin Telegraph Co.*, 119 Mass. 447; Mass. General Statutes, ch. 68, §§ 35–39; Pa. Brightley’s Purdon’s Digest, 197.

¹ 53 & 54 Vict. ch. 63. The portion of the statute relating to winding up goes into effect Jan. 1, 1891. This act and the Companies Acts 1862 to 1886 are to be cited together as “The Companies Acts 1862 to 1890.”

² Newfoundland R. Construction Co. v. Schack, 40 N. J. Eq. 222.

³ Bank v. Shouse, 102 Pa. St. 488; Appeal of Parrish, (Pa. 1890) 19 Atlan. Rep. 569.

⁴ Mann v. Butler, (1847) 2 Barb.

Ch. 362; Greely v. Smith, 3 Story, 657; People v. Walker, 17 N. Y. 502; Ashville Division v. Aston, 92 N. C. 578; Sturges v. Vanderbilt, 73 N. Y. 384; Bank of Gallipolis v. Trimble, 6 B. Mon. 599; Bank of Mississippi v. Wrenn, 11 Miss. 791; Eagle Chair Co. v. Kelsey, 23 Kan. 635; Koutz v. Paola Town Co., 20 Kan. 397; Frothingham v. Barry, 6 Hun, 366; McVicker v. Ross, 55 Barb. 247. Cf. Taylor v. Earle, 8 Hun, 1; Butterfield v. Beardsley, (1874) 28 Mich. 412.

⁵ Burns v. Metropolitan Building Assoc., 2 Mackey, (D. C.) 7. Where the charter, or certificate of incorporation, states that the corporation is to continue in business until such a

corporation may, however, be continued by the formation of a new organization at the end of the period limiting the existence of the old company, and a transfer of its assets and business. And statutory provision is made in some States for the continuance of corporate life by complying with certain formalities.¹ If a corporation has a special charter its term of existence is not affected by any statutory provisions foreign to the charter.²

§ 781. Dissolution by the voluntary act of the corporation — Surrender.—A corporation is not dissolved by the assumption on the part of its members that it is dissolved, nor by a vote of the stockholders to dissolve it merely to escape liability.³ But when not actuated by improper motives, the stockholders may effect a voluntary dissolution or surrender of the charter, by a unanimous vote; and there are cases in which it is held that certain acts and the omission of certain functions may be equivalent to surrender.⁴ In the stockhold-

date, the last day named must be excluded from the reckoning. *People v. Walker*, 17 N. Y. 502.

¹ N. Y. Laws of 1890, ch. 563, § 22.

² *Steadman v. Merchants' &c. Bank*, (1888) 69 Tex. 50. The charter of the Ladies of the Sacred Heart named no limitation to its corporate existence. It stated the purpose of the corporation to be to conduct a seminary of learning and an orphan asylum, and provided that it "by that name and style shall have succession." The charter, also, was specific in its grant of powers. The institution was purely a charitable one. Rev. Stat. Mo. 1845, ch. 34, § 1, par. 1, provides that every corporation, as such, has power to have succession by its corporate name for the period limited in its charter, and, when no period is limited in its charter, for twenty years. It also gives power to make laws for transfer of stock, and makes other provisions which could not apply to

charitable corporations having no shareholders. And it was held that the corporate existence of the Ladies of the Sacred Heart was not limited to twenty years, but was made perpetual. *State v. Ladies of the Sacred Heart*, (1889) 99 Mo. 533.

³ *Baptist Meeting House v. Webb*, 66 Me. 398; *Rollins v. Clay*, 33 Me. 132; *Portland &c. Co. v. Portland*, 12 B. Mon. 77. Cf. *Polar Star Lodge v. Polar Star Lodge*, 16 La. Ann. 53.

⁴ *Slee v. Bloom*, 19 Johns. 456; s. c. 10 Am. Dec. 273; *Hollingshead v. Woodward*, 107 N. Y. 96; *Barclay v. Talman*, 4 Edw. Ch. 124; *Mumma v. Potomac Co.*, 8 Pet. 281; *Bradt v. Benedict*, 17 N. Y. 93; *Bruce v. Platt*, 80 N. Y. 379; *Enfield &c. Bridge Co. v. Connecticut River Co.*, 7 Conn. 28; 2 Kent's Commentaries, 305, 313, 314; *Hampshire v. Franklin*, 16 Mass. 76; *McLaren v. Pennington*, 1 Paige, 102; *King v. Amery*, 2 Term Rep. 515; *King v. Gray*, 8 Mod. 358; *Webster v. Turner*, 21

ers is vested the sole and absolute power of declaring a surrender of the charter; the directors, officers and agents have no other powers than in the administration of the corporate affairs and to put in effect the objects of its existence.¹ But where a minority of stockholders oppose a surrender, it can not be forced upon them by the majority;² unless it be a case where it is plain that a continuation of the business to the expiration of the time fixed by the act of incorporation for corporate existence would result only in financial catastrophe or the failure of the object for which the corporation was created,³ in which event a majority only of the stockholders may surrender the charter and take steps to have the business wound up.⁴ So also an association can not dissolve itself by a resolution without the consent of the shareholders, where the articles do not provide for its dissolution before a certain

Hun, 264; *Mobile &c. R. Co. v. State*, 29 Ala. 573; *La Grange &c. R. Co. v. Rainey*, 7 Coldw. 420; *Chesapeake &c. Canal Co. v. Baltimore &c. R. Co.*, 4 Gill & J. 1; *Savage v. Walsh*, 26 Ala. 619; *Folger v. Columbian Ins. Co.*, 99 Mass. 274; s. c. 96 Am. Dec. 747; *Boston Glass Manufactory v. Langdon*, 24 Pick. 49.

¹*Treadwell v. Salisbury Manuf. Co.*, 7 Gray, 393; s. c. 66 Am. Dec. 490; *Abbot v. American &c. Co.*, 33 Barb. 578; *Hancock v. Holbrook*, 9 Fed. Rep. 353; *Buford v. Keokuk &c. Packet Co.*, 3 Mo. App. 159; *Black v. Delaware &c. Canal Co.*, 24 N. J. Eq. 455; *Kean v. Johnson*, 9 N. J. Eq. 401; *Marr v. Union Bank*, 4 Coldw. 484; *In re Factage Parisien*, 34 L. J. Ch. 140; *Bank of Switzerland v. Bank of Turkey*, 5 L. T. N. S. 549; *In re Suburban Hotel Co.*, L. R. 2 Ch. 737.

²*Zabriskie v. Hackensack &c. R. Co.*, 18 N. J. Eq. 178; *Kean v. Johnson*, 9 N. J. Eq. 401; *Polar Star Lodge v. Polar Star Lodge*, 16 La. Ann. 53; *Mobile &c. R. Co. v. State*, 29 Ala. 573; *Savage v. Walshe*, 26 Ala. 619; *Denike v. New York &c.*

Co., 80 N. Y. 599; *Webster v. Turner*, 13 Hun, 264.

³*Treadwell v. Salisbury Manuf. Co.*, 7 Gray, 393; *Wilson v. Central Bridge*, 9 R. I. 590; *Mobile &c. Co. v. State*, 29 Ala. 573; *Hancock v. Holbrook*, 9 Fed. Rep. 353; *Revere v. Boston &c. Co.*, 15 Pick. 351; *Black v. Delaware &c. Canal Co.*, 22 N. J. Eq. 130; *Bank of Switzerland v. Bank of Turkey*, 5 L. T. N. S. 549; *McCurdy v. Myers*, 44 Pa. St. 535; *Lauman v. Lebanon &c. R. Co.*, 30 Pa. St. 421.

⁴*Wilson v. Central Bridge Co.*, 9 R. I. 590; *Sargent v. Webster*, 13 Met. 504; *Angell & Ames on Corporations*, § 127 *et seq.*; *Binney's Case*, 2 Bland, 99; *Mayor of Colchester v. Lawton*, 1 Ves. & B. 226. *Cf.* *Kean v. Johnson*, 9 N. J. Eq. 401; *Mobile &c. R. Co. v. State*, 29 Ala. 373; *Wilson v. Miers*, 10 C. B. N. S. 348. *Contra*, *Curien v. Santini*, 16 La. Ann. 27; *Polar Star Lodge v. Polar Star Lodge*, 16 La. Ann. 53; *Barry v. Broach*, (1888) 65 Miss. 450. Minority stockholders can not make a surrender. *Denike v. New York &c. Co.*, 80 N. Y. 599.

time.¹ A private corporation may be dissolved by the stockholders without the consent of the State.² And a voluntary winding up by the majority will not be interfered with by the courts except when the interests of the minority stockholders demand it.³ The consent of the State is necessary, however, to an attempted voluntary dissolution by a corporation the condition of whose charter is the performance of certain functions, and the rendering of certain services of a public nature, such as a telegraph or railway company; and, except in cases in which the continuation of the corporate business and existence would result in failure and insolvency, a purely voluntary dissolution is not allowed.⁴ And there is a line of cases holding even with respect to private companies that there must be an acceptance of the surrender by the State.⁵

¹ *Barton v. Enterprise Loan & Build. Assoc.*, (1887) 114 Ind. 226; s. c. 5 Am. St. Rep. 608; *Polar Star Lodge v. Polar Star Lodge*, (1861) 10 La. Ann. 52.

² *Merchants' & Planters' Line v. Wagner*, 71 Ala. 581; *Hollingshead v. Woodward*, 107 N. Y. 96; *Briggs v. Penniman*, 8 Cow. 387; *Slee v. Bloom*, 19 Johns. 456; *Bradt v. Benedict*, 17 N. Y. 96; *Bruce v. Platt*, 80 N. Y. 379.

³ *In re Beaujolais Wine Co.*, L. R. 3 Ch. 15; *In re London &c. Discount Co.*, L. R. 1 Eq. 277; *People v. Hektograph Co.*, 10 Abb. New Cas. 358; *Booth v. Bunce*, 33 N. Y. 139; s. c. 88 Am. Dec. 372; *Treadwell v. Salisbury Manuf. Co.*, 7 Gray, 393; *Hodges v. New England Screw Co.*, 1 R. I. 347. *Cf. White Mountains R. Co. v. White Mountains &c. R. Co.*, 50 N. H. 50; *Rorke v. Thomas*, 56 N. Y. 559; *Barclay v. Quicksilver Mining Co.*, 9 Abb. Pr. N. S. 283; s. c. 6 Lans. 25; *Bronson v. La Crosse Ry. Co.*, 2 Wall. 283; *Young v. Moses*, 53 Ga. 638; *Talbot v. Scrips*, 31 Mich. 268.

⁴ *Lauman v. Lebanon Valley R. Co.*, 30 Pa. St. 42; s. c. 12 Am. Dec.

685; *Central &c. R. Co. v. Collins*, 40 Ga. 582; *Boston &c. R. Co. v. New York &c. R. Co.*, 13 R. I. 260. *Cf. Portland &c. Co. v. Portland*, 12 B. Mon. 77; *Wilson v. Central Bridge Co.*, 9 R. I. 590; *Treadwell v. Salisbury Manuf. Co.*, 7 Gray, 393; s. c. 66 Am. Dec. 490.

⁵ *Kincaid v. Dwinelle*, 59 N. Y. 448; *New York &c. Works v. Smith*, 4 Duer, 362; *Ward v. Lea Ins. Co.*, 7 Paige, 294; *Moseby v. Burrow*, 52 Tex. 396; *Wilson v. Central Bridge Co.*, 9 R. I. 590; *Mechanics' Bank v. Heard*, 37 Ga. 401; *Polar Star Lodge v. Polar Star Lodge*, 16 La. Ann. 53; *Portland &c. Co. v. Portland*, 12 B. Mon. 77; *Norris v. Smithville*, 1 Swan, 164; *Boston &c. Manufactory v. Langdon*, 24 Pick. 49; *Slee v. Bloom*, 19 Johns. 456; s. c. 10 Am. Dec. 273; *Bruce v. Platt*, 80 N. Y. 379; *Bradt v. Benedict*, 17 N. Y. 96; *Briggs v. Penniman*, 8 Cow. 387; *People v. Bank of Hudson*, 6 Cow. 217; *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 473; *King v. Amery*, 2 Term Rep. 515; *King v. Gray*, 8 Mod. Rep. 358; *New York &c. Works v. Smith*, 4 Duer, 362; *Lake Ontario National Bank v. Onondaga*

§ 782. Dissolution by court of equity — (a) At instance of creditors.— A corporation is not dissolved by the fact that it has lost or conveyed all its assets away,¹ nor by the sequestration of its property.² For the possession of property is not essential to corporate existence.³ Where a receiver was appointed to take charge of a corporation on the petition of the inspector of finance, setting forth that he believed the company was insolvent, and an injunction was also issued restraining the company from transacting any further business, and from all custody of or interference with its property until further order, the company in fact not being insolvent, except in its inability to meet its obligations in due course of business, it was held that this was not a dissolution of the corpo-

County Bank, 7 Hun, 551; *La Grange &c. R. Co. v. Rainey*, 7 Coldw. 420; *Campbell v. Mississippi Union Bank*, 7 Miss. 625; *Penobscot Boom Co. v. Lamson*, 16 Me. 224. *Cf.* *Nimmons v. Tappan*, 2 Sweeney, 652; *West v. Carolina Ins. Co.*, 31 Ark. 476; *Town v. Bank of River Raisin*, 2 Doug. (Mich.) 530.

¹ *Swan Land & Cattle Co. v. Frank*, (1889) 39 Fed. Rep. 456; *State v. Western Irrigating Canal Co.*, (1888) 40 Kan. 96; s. c. 10 Am. St. Rep. 166; *Kincaid v. Dwinelle*, 59 N. Y. 548; *Troy &c. R. Co. v. Kerr*, 17 Barb. 581; *Barclay v. Talman*, 4 Edw. Ch. 123, 129; *Moseby v. Burrow*, 52 Tex. 396; *Kansas City Hotel Co. v. Sauer*, 65 Mo. 279; *State v. Merchant*, 37 Ohio St. 251; *Rollins v. Clay*, 33 Me. 132; *De Camp v. Aylward*, 52 Ind. 468; *Richwald v. Commercial Hotel Co.*, 106 Ill. 439; *Bruffet v. Great Western R. Co.*, 25 Ill. 353; *New Jersey Zinc Co. v. New Jersey Franklinites Co.*, 13 N. J. Eq. 322; *Russell v. McLellan*, 14 Pick. 63; *Sullivan v. Truinfo &c. Co.*, 39 Cal. 459. Proof that at the time of a transfer by a corporation it was in fact insolvent, is not conclusive that the assignment was made "in contemplation of the

insolvency of such company," within 1 N. Y. Rev. Stat. 603, § 4; to come within the prohibition of the statute, the act must have been done because of existing or contemplated insolvency. *Paulding v. Chrome Steel Co.*, 94 N. Y. 334. Allegations in the bill that complainant purchased all of the property of the vendor corporation, and that since the sale the vendor had divided its assets among its stockholders, and ceased to exercise its franchise, furnishes no excuse for not making the vendor a party, as the corporation was not dissolved by mere non-use of its franchise, or by the want of assets. *Swan Land & Cattle Co. v. Frank*, 39 Fed. Rep. 456.

² *Mann v. Pentz*, 3 N. Y. 415; *Huguenot National Bank v. Steedwell*, 6 Daly, 13; s. c., reversed on another point, 74 N. Y. 621. Where the property of a corporation is sold pursuant to judicial decree it is not thereby dissolved. *Smith v. Gower*, 2 Duv. 17. *Acc.* *State v. Rives*, 5 Ired. 297; *Bruffett v. Great Western R. Co.*, 25 Ill. 353; *State v. Merchant*, 37 Ohio St. 251.

³ *State v. Western Irrigating Canal Co.*, (1888) 40 Kan. 93.

ration.¹ But such a condition of affairs may constitute grounds for proceedings to dissolve by bill in equity,² filed either by the members of the company themselves³ or by corporate creditors.⁴ While mere insolvency does not necessarily in all cases constitute a ground upon which a court of equity will decree a dissolution,⁵ and while the appointment of a receiver and sale of its property,⁶ or even a judicial decree adjudging the company insolvent, is not equivalent to a dissolution,⁷ there are, nevertheless, many cases in which, upon a showing that it would be to the best interests of all parties in interest, dissolution has been decreed in insolvency proceedings.⁸ Where a

¹ *Dewey v. St. Albans Trust Co.*, 56 Vt. 476; s. c. 48 Am. Rep. 803.

² *Mickles v. Rochester City Bank*, 11 Paige, 118; s. c. 42 Am. Dec. 103; *Barclay v. Talman*, 4 Ed. Ch. 123.

³ *Vide infra*, § 783.

⁴ "Judicial Procedure in Winding-Up and Liquidation of Companies," by A. J. G. Mackay, 23 Jour. Jur. 22; "Must a Winding-Up Creditor Realize his Security," 45 L. T. 217; "Actions for Maliciously Petitioning for a Winding-Up," 17 Irish L. T. 110. Whether or not creditors other than judgment creditors can file such a bill is not well settled. *Cole v. Knickerbocker Ins. Co.*, 23 Hun, 255; *Belknap v. North America &c. Ins. Co.*, 11 Hun, 282. In the provision of the New York Code of Civil Procedure, § 1785, relating to the dissolution of companies by proceedings by the attorney-general at the instance of creditors, the word is construed to mean judgment creditors. *Cole v. Knickerbocker Life Ins. Co.*, 23 Hun, 255; *Belknap v. North American Life Ins. Co.*, 11 Hun, 282; *Paulsen v. Van Sleenburgh*, 65 How. Pr. 342.

⁵ *Coburn v. Boston Manuf. Co.*, 10 Gray, 245; *Nimmons v. Tappan*, 2 Sweeney, 652; *Moran v. Sydecker*, 27 Hun, 582; *New York &c. Works v. Smith*, 4 Duer, 362; *Germantown*

Pass. Ry. Co. v. Fidler, 60 Pa. St. 124; s. c. 100 Am. Dec. 546; *In re Suburban Hotel Co.*, L. R. 2 Ch. 737.

⁶ *Dewey v. St. Albans Trust Co.*, 56 Vt. 476; s. c. 48 Am. Rep. 803; *Ohio &c. R. Co. v. Russell*, 115 Ill. 52; *State v. Merchant*, 37 Ohio St. 251; *People v. Barnett*, 91 Ill. 422; *Safford v. People*, 85 Ill. 558, 560; *National Bank v. Insurance Co.*, 104 U. S. 54; *Second Nat. Bank v. New York Manuf. Co.*, 11 Fed. Rep. 532; *Kincaid v. Dwinelle*, 59 N. Y. 548, affirming s. c. 37 Super. Ct. Rep. 326, followed in *Hollingshead v. Woodward*, 35 Hun, 410; *Huguenot National Bank v. Studwell*, 74 N. Y. 621, reversing s. c. 6 Daly, 13; *Green v. Walkill National Bank*, 7 Hun, 63; *Beach on Receivers*, § 335.

⁷ *Second National Bank v. New York &c. Manuf. Co.*, 11 Fed. Rep. 532; *Coburn v. Boston &c. Manuf. Co.*, 10 Gray, 245; *Moseby v. Burrow*, 52 Tex. 396.

⁸ *Barclay v. Talman*, 4 Edw. Ch. 123. See, also, *In re Factage Parisien*, 34 L. J. Ch. 140; *Masters v. Eclectic Ins. Co.*, 6 Daly, 435; *Hardon v. Newton*, 14 Blatch. 376; *Hugh v. McRae*, Chase's Dec. 466; "Judicial Procedure in Winding-Up and Liquidation of Companies," by A. J. G. Mackay, 23 Jour. Jur. 22.

petition for the voluntary dissolution of a corporation is brought under the New York Code of Civil Procedure, it will be dismissed at the instance of any of the parties to the proceedings, and at any stage thereof, if it appears that the order to show cause is not in conformity to the statute, nor apprising those upon whom it is served of the nature of the proceedings, and that the petition fails to state facts showing that dissolution will be beneficial to the stockholders.¹

§ 783. (b) **At instance of shareholders.**— Unless it appears beyond question that the continuation of a profitable business can not be had, the dissolution of a corporation not yet insolvent will not be decreed upon the petition of a minority of its shareholders.² If, however, it is clear that the business can not be profitably continued, the petition of a minority for a dissolution will be granted.³ And persons with whom it

¹ *In re Pyrolusite Manganese Co.*, 29 Hun, 429.

² *In re Suburban Hotel Co.*, L. R. 2 Ch. 737; *Pratt v. Jewett*, 9 Gray, 34; *Gilman v. Greenpoint Sugar Co.*, 4 Lans. 483; *In re Joint-Stock &c. Co.*, L. R. 8 Eq. 146; *In re London Suburban Bank*, L. R. 6 Ch. 641; *Fountain Ferry Co. v. Jewell*, 8 B. Mon. 140. Cf. *In re Pyrolusite Manganese Co.*, 29 Hun, 429; *Denike v. New York &c. Co.*, 80 N. Y. 599; "Default in Payment of a Call as Affecting the Right to Obtain a Winding-Up Order," 49 L. T. 201.

³ *Marr v. Union Bank*, 4 Coldw. 484. In *In re Bristol Joint-Stock Bank*, 44 Ch. Div. 703, Mr. Justice Kekewich said: "I think a shareholder is entitled to come here—certainly he is if supported by several other shareholders, I do not say that a single shareholder would be so entitled—and say, 'I will not have this business carried on without any reasonable hope of success in order that at some uncertain time hereafter my further capital'—the reserve capital—'may be called up

and used in payment of debts which ought not to be incurred.'"

In another case, *In re Crown Bank*, 44 Ch. Div. 634, where the banking business was practically given up, and a speculative business in land, stocks, and shares carried on instead, the memorandum of association stated the objects for which the company was formed in terms so wide that the counsel who opposed the winding-up, in answer to a suggestion from the bench, could not say that it would not authorize the company to establish and work a line of balloons passing backwards and forwards between the earth and the moon. In spite of this wide enumeration of objects, Mr. Justice North held that the company was not justified in doing things utterly at variance with the business of banking in the largest sense, the name of the company as its start being treated by his Lordship as of importance, and made an order to wind it up on the petition of a shareholder. Before the order had been passed and entered, it was arranged that the

has entered into contract relations will not be heard to oppose the winding-up, where no dishonest motive can be attributed to the shareholders in seeking dissolution.¹ Neither can the officials of the company successfully oppose the winding-up where their motive is merely that they may receive salaries for conducting the enterprise.² Proceedings in equity for the voluntary dissolution of corporations are not adverse proceedings, and are not appealable.³

§ 784. (c) **Grounds for a winding-up order.**— A corporation is not dissolved by mere non-user of its franchises.⁴ A statement, in a petition, that a corporation has ceased to transact business and is insolvent, is not equivalent to an allegation that the corporation is dissolved.⁵ The failure or neglect of trustees to hold meetings does not dissolve the corporation.⁶

objectors to the present state of things should be bought out; so by consent the petition was dismissed. See also *Masters v. Eclectic &c. Ins. Co.*, 6 Daly, 455; *In re Factage Parisien*, 34 L. J. Ch. 140; s. c. 13 Week. Rep. 214; *In re Great Northern &c. Mining Co.*, 17 Week. Rep. 462; *Ward v. Lea Ins. Co.*, 7 Paige, 294; *Pratt v. Jewett*, 9 Gray, 34; *In re Suburban Hotel Co.*, L. R. 2 Ch. 737; *Cramer v. Bird*, L. R. 6 Eq. 143; *In re Joint-Stock &c. Co.*, L. R. 8 Eq. 146; *In re Suburban Bank*, L. R. 7 Ch. 641. See, however, *Polar Star Lodge v. Polar Star Lodge*, 16 La. Ann. 53; *Curien v. Santini*, 16 La. Ann. 27. In Wisconsin there is no statute authorizing one of several stockholders to maintain a bill in equity in his own name, or in the name of the State, without leave being first granted therefor, by the supreme court, to dissolve a corporation and convert its property into money, and then divide the same among the stockholders, and, in the absence of such a statute, such a suit can not be maintained. *Strong v. McCagg*, 55 Wis. 624.

¹ *British Water Gas Syndicate, Limited, v. Notts & Derby Co., Limited*, 6 Ry. & Corp. J. where the court said: "In the present case the circumstances attending the commencement of the company were such that if the shareholders had resolved upon a winding-up, it could not be attributed to a dishonest wish on their part, and if there was jurisdiction to interfere with a voluntary winding-up, this was not a case in which it ought to be exercised."

² *Marr v. Union Bank*, 4 Coldw. 484; *In re Factage Parisien*, 34 L. J. Ch. 140; *In re Tumacacori Mining Co.*, L. R. 17 Eq. 534. Cf. *Masters v. Eclectic &c. Ins. Co.*, 6 Daly, 455.

³ *Cady v. Centreville Knit Goods Manuf. Co.*, 48 Mich. 133.

⁴ *Swan Land & Cattle Co. v. Frank*, (1889) 39 Fed. Rep. 456.

⁵ *Valley Bank & Savings Inst. v. Ladies' Congregational Sewing Society*, 28 Kan. 423.

⁶ *Philips v. Hickman*, 1 Paige, 570; *People v. Runkle*, 9 Johns. 147; *Knowlton v. Ackley*, 8 Cush. 93; *St. Louis &c. Loan Assoc. v. Augustin*; 2 Mo. App. 123; *State v. Vin-*

It can not be dissolved by the resignation of its officers nor their infidelity to their duty to it.¹ So neglect by a corporation to hold meetings for ten years is not, in itself, ground for a dissolution.² Its existence is not terminated by the failure to elect officers on the day designated by its laws.³ But neglect on the part of the stockholders to elect officers or directors when the offices have become vacant, so that the business may be conducted in the methods and through the agencies prescribed by law, and the interests of the corporation and those dealing with it preserved, if it be intentional, is a sufficient reason for the initiation of proceedings by stockholders, or creditors, to dissolve it and have its affairs wound up.⁴ Equity can not dissolve a corporation created by the consolidation of several other corporations on the ground alleged by a stockholder in one of the original corporations, that the consolidation was for a fraudulent purpose, and not legally effected.⁵

§ 785. Abatement of actions upon dissolution.—At common law an action against a corporation abates with its dissolution. Afterwards its attorneys are without power to enter into a stipulation in the suit, and a judgment entered therein is void.⁶ Judgments against a corporation rendered upon pro-

cesses University, 5 Ind. 80, 81; President & Trustees &c. v. Thompson, 20 Ill. 197; People v. Wren, 5 Ill. 269. Cf. Smith v. Smith, 3 Desauss. 557; Ward v. Sea Ins. Co., 7 Paige, 294; People v. Twaddell, 18 Hun, 427.

¹ People v. Twaddell, 18 Hun, 427; Reilly v. Oglebay, 25 W. Va. 36, 43; Boston &c. Manufactory v. Langdon, 24 Pick. 49; s. c. 35 Am. Dec. 292; Philips v. Wickham, 1 Paige, 590, 596; Russell v. McLellan, 14 Pick. 63; Evarts v. Killingworth Manuf. Co., 20 Conn. 447; Hoboken &c. Assoc. v. Martin, 13 N. J. Eq. 427; Muscatine Turn Verein v. Funck, 18 Iowa, 469, 472.

² State v. Barron, 58 N. H. 370. See State v. Vincennes University, 5 Ind. 80.

³ Allen v. New Jersey Southern R. Co., 49 How. Pr. 14; People v. Twaddell, 18 Hun, 427; Reilly v. Oglebay, 25 W. Va. 36, 43; Nashville Bank v. Petway, 3 Humph. 522; Harris v. Mississippi Valley &c. R. Co., 51 Miss. 602; Swan Land & Cattle Co. v. Frank, 39 Fed. Rep. 456.

⁴ Bruce v. Platt, 80 N. Y. 379; Knowlton v. Ackley, 8 Cush. 93; Curry v. Woodward, 53 Ala. 375; Brown v. Union Ins. Co., 3 La. Ann. 177; "Just and Equitable Causes for Winding-up," 73 L. T. 174.

⁵ Terhune v. Midland R. Co., 38 N. J. Eq. 423.

⁶ In re Norwood, 32 Hun, (N. Y.) 196; Saltmarsh v. Planters' &c. Bank, 17 Ala. 761; Bank of Louisiana v. Wilson, 19 La. Ann. 1; Miami Exporting Co. v. Gano, 13 Ohio, 269;

cess issued after it ceased to exist are of no validity, and may be impeached by a party interested in the administration of its assets.¹ But a Missouri corporation having real estate in Illinois was sued in the latter State, and the real estate attached. Afterwards the corporation was dissolved, and its affairs put into the hands of a receiver in Missouri, and it was held that the suit would not thereby be defeated, especially as the decree dissolving the corporation provided that suits might be brought and defended in the name of the corporation.² The several statutes relating to the dissolution and winding up of corporations generally provide, however, for a continuance of the capacity to sue and be sued so that their assets may be collected and claims against them may be enforced.³ And receivers are sometimes appointed for this purpose.⁴ A private business corporation which fails to wind up

City Ins. Co. v. Commercial Bank, 68 Ill. 348, 354; *Greeley v. Smith*, 3 Story, C. C. 657; *Ingraham v. Terry*, 11 Humph. 572; *Carey v. Giles*, 10 Ga. 9; *Merrill v. Suffolk Bank*, 31 Me. 57; s. c. 50 Am. Dec. 649.

¹ *Dobson v. Simonton*, 86 N. C. 492; *Merrill v. Suffolk Bank*, 31 Me. 57.

² *Life Association of America v. Fassett*, 102 Ill. 315.

³ *Foster v. Essex Bank*, 16 Mass. 245; *Merrill v. Suffolk Bank*, 31 Me. 57; s. c. 50 Am. Dec. 649; *Miller v. Newburg Orrel Coal Co.*, (1889) 31 W. Va. 836; *Crease v. Babcock*, 10 Met. 525, 567; *Golger v. Chase*, 18 Pick. 63; *Tuscaloosa &c. Assoc. v. Green*, 48 Ala. 346; *Thornton v. Marginal Freight Ry. Co.*, 123 Mass. 32; *Mariners' Bank v. Sewall*, 30 Me. 220; *Franklin Bank v. Cooper*, 36 Me. 179; *Stetson v. City Bank*, 12 Ohio St. 577; *Muscatine Turn Verein v. Funck*, 18 Iowa, 469; 1 How. Stat. (Mich.) 1244, § 4867; *McGoon v. Scales*, 9 Wall. 23; *In re Independent Ins. Co.*, 1 Holmes, 103; *Mason v. Pewabic Mining Co.*, 25 Fed. Rep. 882; *Rawitt v. Bank of Port Gibson*, 14 Miss. 513; *Van Glahn v. De Ros-*

set, 81 N. C. 467; *Michigan State Bank v. Gardner*, 15 Gray, 362; *Blake v. Portsmouth &c. R. Co.*, 39 N. H. 435; *Herron v. Vance*, 17 Ind. 595. In West Virginia it is said that at common law, when a corporation ceased to exist by expiration of its charter, or by its dissolution by a forfeiture of its charter, judicially ascertained and declared, or in any other manner, all suits for or against it abated. But this is not now the law; the common law on this subject having been repealed by statute. A suit by or against a private corporation can not be abated or dismissed because the corporation has been dissolved by a forfeiture of its charter, so judicially ascertained or declared, or by its dissolution in any other manner. *Greenbrier Lumber Co. v. Ward*, (W. Va. 1887) 3 S. E. Rep. 227.

⁴ *Lothrop v. Stedman*, 13 Blatchf. 134, 143; *Owen v. Smith*, 31 Barb. 641; *Van Glahn v. De Rosset*, 81 N. C. 467; *Life Assoc. v. Fassett*, 102 Ill. 315, where it was said that if the corporation were to be regarded as really defunct, so as to defeat the

its business when its charter expires, but continues in its charter name to carry on its corporate business, may be sued in its corporate name for a tort committed by it after the expiration of its charter.¹

§ 786. **Receivers for dissolved corporations.**—The mere fact that a corporation has been dissolved, does not in every instance give the minority stockholders the right to have a receiver appointed and the assets sold, as there may be circumstances which will justify a court of equity in ascertaining the value of the assets without a sale, and in making a distribution to the members on that basis.² When directors and officers of the defunct corporation are, by statute, made trustees of the assets for the benefit of creditors, as is the case in some States,³ the business of settling its affairs can not be taken from them and put into a receiver's hands unless there has been fraud on their part.⁴ When a receiver has been appointed, the title to all the company's property vests in him as trustee for the benefit of creditors and stockholders.⁵

§ 787. **Survival of choses in action, etc.**—Debts due the corporation, franchises and *choses in action*, are not destroyed by a dissolution and may be enforced and utilized for the benefit of those interested;⁶ although the corporation may not

suit against it, a writ of error brought with that purpose would have to be dismissed, if brought in the name of the corporation, as, if defunct, the writ should be prosecuted in the receiver's name.

¹ *Miller v. Newburg Orrel Coal Co.*, (1889) 31 W. Va. 836, holding also that in such a case a plea that the charter of the corporation had expired, and that it had ceased to exist in law at the time the alleged cause of action arose, will be held bad, because it does not also aver that the corporation had wound up its business and ceased to exist in fact as well as in law.

² *Baltimore &c. R. Co. v. Cannon*, (Md. 1890) 8 Ry. & Corp. L. J. 358.

³ *E. g.* N. Y. Laws of 1890, ch. 563,

§§ 19, 20; *Central City Savings Bank v. Waller*, 66 N. Y. 424, 428; *Frothingham v. Barney*, 6 Hun. 366, 372; *Towar v. Hale*, 46 Barb. 361, 365; *Paola Town Co. v. Krutz*, 22 Kan. 728. See *Bliss v. Matteson*, 45 N. Y. 22.

⁴ *Follett v. Field*, 30 La. Ann. 161.

⁵ *Bacon v. Robertson*, 18 How. 489; *Heath v. Barmore*, 50 N. Y. 302; *Owen v. Smith*, 31 Barb. 641; *Towar v. Hale*, 46 Barb. 361; *Life Assoc. v. Fassett*, 102 Ill. 315, 323; *People v. College of California*, 38 Cal. 166.

⁶ *Greenwood v. Union Freight Co.*, 105 U. S. 13; *People v. O'Brien*, (1888) 111 N. Y. 1; *Read v. Frankfort Bank*, 23 Me. 318. *Cf.* *People v. National Trust Co.*, 82 N. Y. 283;

sue in its own name.¹ Thus the property of a religious corporation, dissolved by reason of the expiration of its charter, vests in its members, who may reincorporate; and the new corporation may sue for breach of a condition relating to the premises, especially where it has been in possession and managed the property without objection for many years.² So a franchise to construct and maintain a street railway, which is not a mere license but an indestructible legislative authority and property in the highest sense of the term, upon the dissolution of the corporation holding it, becomes vested in the directors then in office or those having control of the business of the corporation, in trust for creditors and stockholders.³ A lease to a corporation is not terminated by its dissolution.⁴

§ 788. Enforcement of creditors' claims after dissolution.—Equity will enforce collection of a corporation's debts after dissolution and after the expiration of the time within which a suit at law should have been brought.⁵ The doctrine that the capital stock and assets of a corporation constitute a trust fund for the benefit of creditors is especially applicable to insolvent and dissolved corporations, and has been generally recognized in this country, except in a comparatively few instances in which the English rule that the property in

"Effect of Winding-Up on a Company's Contracts," 50 L. T. 292.

¹ *Bank of Louisiana v. Wilson*, 19 La. Ann. 1. Cf. *Greely v. Smith*, 3 Story, 657.

² *Congregation of the Roman Catholic Church v. Texas & P. Ry. Co.*, (1890) 41 Fed. Rep. 564.

³ *People v. O'Brien*, (1888) 111 N. Y. 1. Under Gen. Stat. Colo. § 240, empowering a corporation to convey its property; and sections 341, 342, by which its property, on dissolution, passes to its directors, instead of reverting,—the right of way of a ditch company does not cease with the expiration of its charter, but, having previously been conveyed, its grantee may thereafter continue the use of the same. *Bailey v. Platte &c. Co.*, (Colo.) 21

Pac. Rep. 35, *De France, C.*, dissenting.

⁴ *People v. National Trust Co.*, 82 N. Y. 283. For a full discussion of this subject see *note* to *People v. O'Brien*, 7 Am. St. Rep. 717.

⁵ *Howe v. Robinson*, 20 Fla. 352. Cf. *Effect of Winding-up on a Company's Contracts*, 50 L. T. 292. See, also, *Hewett v. Hatch*, 57 Vt. 16; *Rundel v. Life Assoc. of America*, 4 Woods, C. Ct. 94; *Hampstead Building Assoc. v. King*, 58 Md. 279; *State Council v. Sharp*, 38 N. J. Eq. 24; *Hibernia Fire Engine Co. v. Commonwealth*, 93 Pa. St. 264; *People v. Cohocton Stone Road*, 25 Hun, 13; *Life Assoc. of America v. Fassett*, 102 Ill. 315. But see *Gray v. National S. S. Co.*, 115 U. S. 116, as to claims for personal injuries.

such a case reverts to the king or to the original grantors, was upheld. It is a rule well settled and generally observed that the death of a corporation leaves unimpaired the rights of creditors to its property in payment of their debts,¹ in whatever manner the dissolution may have been brought about.² Thus the fact that a corporation has been ousted by a judgment in *quo warranto* proceedings, does not affect the right of the creditors nor the liability of the stockholders.³ Where, on the dissolution of an insurance company, the receiver reported the total indebtedness of the company, all the premium notes held by it, the losses and expenses, and the percentage of assessments each class of notes was liable for, and the court decreed an assessment, to be made on each class in a specific amount, it was held, in a suit to recover the assessment, that the policy-holder was bound by this decree.⁴ Where a decree directing that the debts of a corporation are to be paid by the defendant stockholders in certain pro-

¹Greenwood v. Union Freight Co., 105 U. S. 13; Terrett v. Taylor, 9 Cranch, 43; Fisk v. Union Pacific R. Co., 1 Blatch. 518; Tinkham v. Borst, 31 Barb. 407; Curran v. Arkansas, 15 How. 304; Mumma v. Potomac Co., 8 Pet. 281; Life Assoc. v. Fassett, 102 Ill. 315, 323; McCoy v. Farmer, 65 Mo. 244. In an action to dissolve a manufacturing corporation, the referee, in pursuance of 2 N. Y. Rev. Stat. 469, § 73, reported that two stockholders had assets in their hands which, so far as was necessary to pay debts and produce equality of distribution, they had no right to retain, whereto no exceptions were filed; the receiver, instead of entering final judgment thereon, made up his account and filed a petition reporting the precise amount they should pay, and praying they be adjudged to pay accordingly; a copy whereof was served on them, and they appeared and had full opportunity to be heard; and it was held that the irregularity

was no ground for reversal of the judgment against them. People v. Hydrostatic Paper Co., 88 N. Y. 623.

²Rowland v. Meader Furniture Co., (1883) 38 Ohio St. 269; McCoy v. Farmer, 65 Mo. 244; Howe v. Robinson, 20 Fla. 352; Thornton v. Marginal Freight Ry. Co., 123 Mass. 32; Blake v. Portsmouth & c. R. Co., 39 N. H. 435; Lum v. Robertson, 6 Wall. 277; Bacon v. Robertson, 18 How. 480. Cf. McGoon v. Scales, 9 Wall. 23; Robinson v. Lane, 19 Ga. 337; Fox v. Horah, 1 Ired. Eq. 358; s. c. 36 Am. Dec. 48; Malloy v. Mallett, 6 Jones Eq. 345; Port Gibson v. Moore, 21 Miss. 157; Bank of Mississippi v. Duncan, 56 Miss. 166, 173. See, however, Erie & c. R. Co. v. Casey, 26 Pa. St. 287; Colchester v. Seaber, 3 Burr. 1866; Commercial Bank v. Lockwood, 2 Harr. (Del.) 8.

³Rowland v. Meader Furniture Co., (1883) 38 Ohio St. 269.

⁴Lycoming Fire Ins. Co. v. Langley, 62 Md. 196.

portions, is reversed on appeal by some of the defendants, so as to make it necessary to find a different amount of indebtedness, the reversal vacates the decree even as to a defendant who did not appeal.¹

§ 789. **Distribution of assets among shareholders.**—Upon the dissolution of a company, whether by repeal of its charter,² or by forfeiture or insolvency or any other means, the stockholders are entitled to share in the surplus assets remaining after the claims of creditors have been satisfied, in proportion to the amounts contributed by them to the capital stock.³ In the case of building associations, after creditors' claims and the expenses incident to the administration of the assets have been paid, the residue is to be distributed among those whose claims are based on the stock of the association, whether they have withdrawn and hold orders for the withdrawal value of their stock or not.⁴ After dissolution the corporate property is to be treated as partnership assets and divided accordingly.⁵ And directors who conduct the business of the corporation after expiration of its charter, without attempting to wind it up, may be required to account in a proceeding by stockholders

¹ *Alling v. Ward*, (Ill. 1890) 8 Ry. & Corp. L. J. 124.

² *Lothrop v. Stedman*, 13 Blatch. 134.

³ *Krebs v. Carlisle Bank*, 2 Wall. C. C. 33; *Shorb v. Beaudry*, 56 Cal. 446; *McVicker v. Ross*, 55 Barb. 247; *Taylor v. Earl*, 8 Hun, 1; *Frothingham v. Barney*, 6 Hun, 366; *In re Bridgewater Nav. Co.*, (Ch. Div. 1887) 3 Ry. & Corp. L. J. 591; *Fesh v. Nebraska City &c. Co.*, 25 Fed. Rep. 795; *Wood v. Dummer*, 3 Mason, 308, 322; *Burrall v. Bushwick R. Co.*, 75 N. Y. 211; *Heath v. Barmore*, 50 N. Y. 302; *Dudley v. Price*, 10 B. Mon. 84; *James v. Woodruff*, 10 Paige, 541; s. c. affirmed, 2 Denio, 574; *Bank of Commerce's Appeal*, 73 Pa. St. 59; *Chappell's Case*, L. R. 6 Ch. 902; *Callanan v. Edwards*, 32 N. Y. 483; *Sewall v. Chamberlain*, 16

Gray, 501; *Hart v. Boston &c. R. Co.*, 40 Conn. 524; *Graham v. Boston &c. R. Co.*, 118 U. S. 161; *Covington &c. Bridge Co. v. Mayer*, 31 Ohio St. 319, 325; *McGregor v. Home Ins. Co.*, 33 N. J. Eq. 181; *In re London &c. Co.*, L. R. 5 Eq. 519. But see *Griffith v. Paget*, 6 Ch. Div. 511; *Bangor &c. Co.*, L. R. 20 Eq. 59. Cf. *Thornton v. Marginal Freight Ry. Co.*, 123 Mass. 32; *Nathan v. Whitlock*, 9 Paige, 152; *Lea v. American Atlantic &c. Canal Co.*, 3 Abb. Pr. N. S. 1; *Curren v. State*, 15 How. 304, 307; *Hastings v. Drew*, 76 N. Y. 9, affirming s. c. 50 How. Pr. 254; *Wilde v. Jenkins*, 4 Paige, 481; *Appeal of Huston*, (Pa. 1889) 18 Atlan. Rep. 419.

⁴ *Christian's Appeal*, 102 Pa. St. 184.

⁵ *Shorb v. Beaudry*, 56 Cal. 446.

to wind up the affairs of the corporation.¹ A majority of the shareholders have no right to buy in the property at an unfair valuation to the prejudice of the minority; and where they have done so, equity will grant them no relief for losses incurred in the transaction.²

§ 790. Reversion and escheat of property to grantor and to the State.— At common law upon the dissolution of a corporation, its debts were extinguished, its real estate reverted to the grantor and its personalty escheated to the sovereign.³ While this has long ceased to be the law with respect to private companies having capital stock, there are a few modern decisions in which, with some modification, the old rule has been applied to railway and canal companies and to eleemosynary corporations.⁴ Thus in a late case it was held that upon

¹ *Mason v. Pewabic Mining Co.*, (1890) 133 U. S. 50; s. c. 7 Ry. & Corp. L. J. 252. *Cf.* *Young v. Moses*, 53 Ga. 628.

² *Ervin v. Oregon Ry. & Nav. Co.*, 27 Fed. Rep. 625; s. c. 28 Fed. Rep. 833. In this case the owners of a majority of the stock of a corporation, under the form of dissolving it and disposing of its property and distributing the proceeds, became the purchasers of the property at an unfair price, through a new corporation, in which they were stockholders, to the exclusion of the minority shareholders in the old corporation. In a suit in equity by the latter against the new corporation it was held that they had no equitable lien to the extent of the moneys of which they had been deprived by the sale on the property of the old corporation in the hands of the new corporation.

³ *Hightower v. Thornton*, 8 Ga. 486; s. c. 52 Am. Dec. 412; *Fox v. Horah*, 1 Ired. Eq. 358; s. c. 36 Am. Dec. 48; *State Bank v. State*, 1 Blackf. (Ind.) 267; s. c. 12 Am. Dec. 234; *Coulter v. Robertson*, 24 Miss. 278; s. c. 57 Am. Dec. 168; *Bingham v.*

Weiderwax, 1 N. Y. 509; *Owen v. Smith*, 31 Barb. 641; *Life Assoc. v. Fassett*, 102 Ill. 315; *Malloy v. Mallett*, 6 Jones' Eq. (N. C.) 345; *State v. Rives*, 5 Ired. 297; *White v. Campbell*, 5 Humph. 38; *Commercial Bank v. Lockwood*, 2 Harr. (Del.) 8; *Miami & Co. v. Gano*, 13 Ohio St. 269; *Lum v. Rertson*, 6 Wall. 277; *Curran v. State*, 15 How. 304; *King v. London*, 8 Howell's State Trials, 1087; *Attorney-General v. Lord Gowes*, 9 Mod. 224; *King v. Pasmore*, 3 Term Rep. 199; *Port Gibson v. Moore*, 21 Miss. 157.

⁴ *Coulter v. Robertson*, 24 Miss. 278; s. c. 57 Am. Dec. 168; *Bank of Mississippi v. Duncan*, 56 Miss. 166; *St. Philip's Church v. Zion & Co. Church*, 23 S. C. 297; *Hopkins v. Whitesides*, 1 Head, 31; *Acklin v. Paschal*, 48 Tex. 147. But see *Erie & C. R. Co. v. Casey*, 26 Pa. St. 287, and *State v. Rives*, 5 Ired. 297. In New York land taken for the construction of canals and park purposes reverts to the State. *Rexford v. Knight*, 11 N. Y. 308, affirming s. c. 15 Barb. 627. *Cf.* *Commonwealth v. Fisher*, 1 Pen. & W. (Pa.

the dissolution of a theological seminary, having no debts and no stockholders, the title to its lands reverted to the original owner.¹ And in the recent case of the Mormon church it was held that upon its dissolution, its personal property vested in the federal government to be applied under the doctrine of *cy pres* to some kindred object, and that its realty, in excess of fifty thousand dollars in value, escheated to the United States.² But where the charter of a religious corporation being about to expire, due application for a renewal was made, but, without the fault of the corporation, there was a delay in granting the renewal, it was held that when granted it related back so as to prevent a reverter of property.³

§ 791. Reorganization.—The reorganization of a corporation is brought about by the formation of a new corporation which, by one means or another, comes into possession of the property and franchises of the old corporation and continues

Rep.) 462; *Plitt v. Cox*, 43 Pa. St. 486; *De Varaigne v. Fox*, 2 Blatchf. 95; *Brooklyn Park Commissioners v. Armstrong*, 45 N. Y. 234; s. c. 6 Am. Rep. 70, reversing s. c. 3 Lans. 429; *Heyward v. City of New York*, 7 N. Y. 314; *Dingley v. City of Boston*, 100 Mass. 544; *Haldeman v. Pennsylvania R. Co.*, 50 Pa. St. 425.

¹ *Mott v. Danville Seminary*, 129 Ill. 403.

² *Late Corporation of the Church of Jesus Christ v. United States*, (1890) 136 U. S. 1, holding that congress has plenary and supreme legislative power over the territories of the United States and their inhabitants; and Act Cong. Feb. 19, 1887, § 19, (Acts 1885-87, p. 638) abrogating the charter of the Church of Jesus Christ of Latter-Day Saints, granted by the legislature of Utah January 19, 1855, and dissolving the corporation, was a valid exercise of that power, and the corporation has ceased to have any existence as a civil body. Act Cong. July 1, 1862, provided that no

religious or charitable corporation in the territories should hold real estate exceeding \$50,000 in value, and that all real estate held by any such corporation contrary to the act should escheat to the United States. The title of all the real estate acquired by that corporation in Salt Lake City remained in the United States as part of the public domain until November 21, 1871, when it was entered by the mayor of the city under Act Cong. March 2, 1867, known as the "Town-Site Act." And it was held that on the dissolution of the corporation all of its real estate in such city except a block used for public purposes, reverted to the United States. The fact that all the property of the corporation was held by individuals in trust for the corporation did not prevent the title from escheating according to the intent of the acts. *Mormon Church v. United States*, (1890) 136 U. S. 1.

³ *St. Phillip's Church v. Zion Presbyterian Church*, 23 S. C. 297.

its business, it may be on a new basis.¹ The transfer of the corporate property and business to other control upon the expiration of the corporation by lapse of time, or the renewal of the charter of the deceased corporation,² or the consolidation of two or more corporations which may unite in a new company or undergo absorption by an existing corporation, are loosely spoken of as reorganization. None of these, however, are reorganization in its strictly legal sense.³ The term "reorganization," in corporation law, has a technical meaning, and is applied to the measures taken, after corporate insolvency, to preserve and re-adjust the interests of the stockholders and the mortgage creditors,⁴ which measures are usually precipitated by the foreclosure of the mortgage resting upon the property, and may either precede, accompany or follow the decree of foreclosure and sale.⁵ Where, upon the insolvency of a corporation and default upon its mortgage obligations, the mortgagees undertake to realize their security and proceed to a decree of foreclosure and sale, the purchasers at the sale become the owners of the property, and may either form a new company or may transfer the property to an existing organization.⁶ By this means the rights and interests of the old stockholders are disposed of,⁷ unless they come to some understanding with the mortgagees as to their future *status*, before the decree of foreclosure. This they are generally able to accomplish, for, by means of injunctions, demurrers, cross-bills, motions, commissions to take testimony and various other weapons, they have the power to embarrass the progress of the foreclosure proceedings to such an extent that the bondholders willingly embrace the opportunity for negotiation which results in a plan for reorganization in which all interests are recognized.⁸ Where there has been a complete and valid reorganization it will not be opened or dis-

¹ Ry. & Corp. L. J. 97.

⁵ Canada Southern Ry. Co. v. Gebhard, 109 U. S. 509.

² Morawetz on Private Corporations.

⁶ People v. Brooklyn & C. Ry. Co., 89 N. Y. 75. Cf. Acres v. Moyne, 59 Tex. 623, 625; Wellsborough & C. Co. v. Griffin, 57 Pa. St. 417.

³ *Vide supra*, Chapter XVII. See Reilly v. Oglesby, 25 W. Va. 36; Banks v. Judah, 8 Conn. 145; San Francisco & C. R. Co. v. Bee, 48 Cal. 398.

⁷ Thornton v. Wabash Ry. Co., 81 N. Y. 462.

⁴ Ry. & Corp. L. J. 97.

⁸ Jones on Railroad Securities,

turbed, the rights of all parties having been properly adjusted;¹ and it has been held that stockholders are chargeable with notice of the existence of the law and with the general features of the scheme of reorganization, and can not maintain an action to be allowed to participate after the expiration of the time within which they should have come in.² In New York the time is limited by statute to six months.³ Bondholders who had an opportunity to purchase and neglected to do so,⁴ or who, with notice of the facts, have approved a plan of reorganization,⁵ or who surrender their bonds to the trustees, taking stock and bonds, in pursuance of a plan for foreclosure and sale, in order to form a new company, can not, in the absence of fraud, be heard to interpose any objection to the proceedings.⁶ The bare fact that some of the trustees are holders of bonds secured by their trust, is not sufficient of

§ 614. Ordinary foreclosure, without the intervention of these amicable methods, is "destructive of vast pecuniary interests, harsh to junior lienors, and inconsistent with the public right to have a highway continuously operated. Those who are subordinate to the first lien have opposed it bitterly, since they earnestly believe their expectations to be of the nature of a vested interest, which should not be interfered with so long as they are willing to bear some sacrifices for the realization of those expectations. Almost endless and Titanic litigations have been the result. Courts have leaned against the strict forfeiture of equities of redemption forever cutting off such contingent but vast pecuniary interests." . . . "The absolute right of foreclosure, while admitted in theory, is made so difficult of accomplishment in practice that it amounts almost to a denial of a contract obligation of the railway mortgagors. Therefore there is a semi-enforced acquiescence by first mortgagees in almost every case where the junior lienors and stock-

holders exhibit any willingness to place, by assessment on their own holdings, the property in proper repair and efficient condition; adding thereby to the security of the first lien, and either paying or funding the defaulted interest on prior liens." "Railway Reorganization," by Simon Sterne, (Sep. 1890) 10 Forum, 37. Cf. "Arrangements in Connection with Insolvent Companies," 57 L. T. 76; *Robinson v. Philadelphia & C. R. Co.*, 28 Fed. Rep. 340; *Ricker v. Alsop*, 27 Fed. Rep. 251.

¹ *Matthews v. Murchison*, 15 Fed. Rep. 691; *Wetmore v. St. Paul & C. R. Co.*, 5 Dill. 531. Bondholders, who have assented to the plan, in order to obtain new bonds, must deliver up the old ones before the purchase at the foreclosure sale. *Carpenter v. Catlin*, 44 Barb. 75.

² *Vatable v. New York & C. R. Co.*, 96 N. Y. 49.

³ N. Y. Laws of 1890, ch. 564.

⁴ *Credit Co. v. Arkansas Central R. Co.*, 15 Fed. Rep. 46.

⁵ *Matthews v. Murchison*, 15 Fed. Rep. 691.

⁶ *Crawshaw v. Soutter*, 6 Wall. 739.

itself to make them incompetent to consent to a decree of foreclosure embodying a plan for reorganization.¹

§ 792. Method of effecting reorganization — Statutory regulations.— The purchasers of corporate property upon a foreclosure sale are vested with rights in the property which are absolute as against the corporation and stockholders, all of whose interests are thereby barred;² but the conflicting interests are usually compromised for the reasons stated in the preceding section, under a plan or scheme of reorganization which is in many States regulated by statute. In New York there are a number of statutes prescribing methods of reorganization.³ The New York Stock Corporation Law of 1890 provides that at or prior to the sale, the purchasers, or the persons for whom the purchase is to be made, may make an agreement for the adjustment of the interests of the mortgage creditors and the stockholders for a representation of the interests in the new corporation, and may make regulations with respect to voting by the stockholders and bondholders. The plan must be consistent with the laws of the State, and is binding upon the corporation until changed as provided therein, or as otherwise provided by law. Bonds and stock may be issued in accordance with the plan, in the new corporation, which may, at any time within six months after its organization, settle any debts of the old corporation upon such terms as may be approved by the trustees or agents

¹ *Shaw v. Little Rock &c. R. Co.*, (1879) 100 U. S. 605.

² *Vatable v. New York &c. R. Co.*, 96 N. Y. 56.

³ N. Y. Laws of 1850, ch. 140, § 5, as amended by N. Y. Laws of 1854, ch. 282, and by N. Y. Laws of 1874, ch. 430; "The Stock Corporations Law of 1890," N. Y. Laws of 1890, ch. 564, §§ 1-7; *Pratt v. Munson*, 84 N. Y. 582. The fee for incorporation must be paid in the case of a corporation so organized as if it were originally formed. *People v. Cook*, 110 N. Y. 443. And the passage of an act requiring the payment, upon incorporation, of a tax amounting

to a certain percentage of the capital stock, subsequent to the formation of the insolvent company, applies to a corporation formed by the purchasers at a foreclosure sale, (*People v. Cook*, 110 N. Y. 443) for it is held that statutes authorizing the mortgaging of corporate property do not constitute a contract on the part of the State with the mortgagors that the act providing for the incorporation of purchasers at a mortgage sale will not be altered. *Memphis &c. R. Co. v. Commissioners*, 112 U. S. 609. See also *Beach on Railways*, § 766.

intrusted with the execution of the plan of reorganization. Stockholders in the old corporation may assent to the plan at any time within six months after the formation of the new company, and, upon complying with the terms of the plan, may become entitled to their share of the benefits.¹ Similar statutes exist in other States.² Special acts are also sometimes passed incorporating the purchasers of corporate property at a foreclosure sale.³

§ 793. Obligations and rights of the parties to the reorganization agreement.—The agreement usually provides that stockholders of the old corporation may have stock in the new one upon certain conditions, such as the surrender of two shares of stock for one, or submitting to an assessment upon their stock for reorganization purposes. A certain time is given them to signify their acceptance of the conditions;⁴ and, if they neglect to do so within the required time they lose their rights and the courts can give no relief,⁵ for the new corporation can not be forced to admit them. The only remedy left is to impeach the foreclosure proceedings.⁶ All the provisions of the reorganization agreement must be strictly carried out by the parties.⁷ A committee, therefore, appointed to receive and disburse subscriptions for the pur-

¹ N. Y. Laws of 1890, ch. 564, § 3.

² Ohio Rev. Stat. (1880) §§ 3393 *et seq.*; Indiana Rev. Stat. (1881) §§ 3945 *et seq.* The provision of the Arkansas Constitution (Ark. Const. 1874, art. xii) that "no private corporation shall issue stock or bonds except for money or property actually received, and all fictitious increase of stock or indebtedness shall be void," has been held not to prohibit mortgage bondholders, who buy in the property and franchise of a corporation upon foreclosure sale under their mortgage, from declaring upon what terms they will surrender those interests, and it is competent for them to reorganize on substantially the same basis, with regard to capital stock and bonded indebtedness, as that of the old corporation before

the present constitution was adopted, even though they thereby receive both stock and bonds in a large amount, of which the amount of the stock alone is sufficient to cover the full value of the property, rights and privileges of the reorganized company. *Memphis & Little Rock R. Co. v. Dow*, 120 U. S. 287.

³ *Wilmington & C. R. Co. v. Downward*, (Del. 1888) 4 Ry. & Corp. L. J. 230.

⁴ N. Y. Laws of 1890, ch. 564.

⁵ *Vatable v. New York & C. R. Co.*, 96 N. Y. 57.

⁶ *Vatable v. New York & C. R. Co.*, 96 N. Y. 57; *Thornton v. Wabash Ry. Co.*, (1880) 81 N. Y. 462; *Vanalstyn v. Houston & C. R. Co.*, 56 Tex. 377.

⁷ *Miller v. Rutland & C. R. Co.*, 40 Vt. 399.

pose of effecting a consolidation of certain railroad companies, and extending the lines, may be required to account to the subscribers for the amount so received, and it is immaterial whether or not they were originally trustees, or were legally appointed.¹ Fraud on the part of the promoters of a reorganization scheme, secret agreements and the like, constitute a wrong for which equity will grant relief.² And it has been held that even where a sale is authorized by the majority of the stockholders, it may be set aside;³ and the minority shareholders are not bound by a reorganization scheme of the majority whereby the property is to be transferred to the new company at a valuation fixed by the majority, unless it be shown that no more could be obtained at a cash sale at auction.⁴ A minority of the bondholders secured by a mortgage have no right to enter into an agreement to purchase the railroad and mortgaged property at the lowest possible price, for the exclusive benefit of the parties to the agreement, with no reference to the other bondholders.⁵ Those

¹ *Gould v. Seney*, (N. Y. Sup. Ct. 1890) 5 N. Y. Supl. 928; s. c. 9 id. 818. In this case a consolidation of three railroad companies was proposed, the necessary funds to be raised by subscriptions of the stockholders of the several companies. It was doubtful whether one of the companies (the R. & A.) could obtain legislative consent to enter the combination, but it was arranged that the other two should combine at all events, and the subscribers were aware of this. The first call under the subscription stated that it was for the extension of one of the two roads whose consolidation was definitely arranged for, and for "other purposes." Afterwards the entire fund was paid in. A committee was appointed, after the first installment was paid, to receive and disburse the fund. After this the consolidated agreement was filed. It was held that a loan by the committee to the R. & A. Company, for the purpose of

completing its line of railroad, to be re-paid in case the agreement should not become operative as to that company, was a misappropriation of the fund, for which they became liable to account to the subscribers upon the legislature refusing to consent to the company entering the combination; but that the shareholders could not, at the time of compelling the accounting, insist that the committee should also account for bonds taken as collateral for the loan.

² Cf. *Ex parte White*, 2 S. C. 469; *Bliss v. Matteson*, 45 N. Y. 22.

³ *Reilly v. Oglesby*, (1884) 25 W. Va. 36. Though when they act in good faith and take no improper advantage of their co-stockholders or other interests, a purchase of them will be ratified. *Carter v. Ford & Co.*, 85 Ind. 180.

⁴ *Mason v. Pewabic Min. Co.*, 25 Fed. Rep. 882.

⁵ *Jackson v. Ludeling*, 21 Wall. 616.

who hold fiduciary positions in the corporation can not acquire the corporate property in a manner adverse to the interests of their *cestuis que trustent*, and can not become the purchasers of the property directly or indirectly at a foreclosure sale, nor participate in an arrangement to obtain the corporate property at the lowest possible figure.¹ But where a mortgage of a railroad contained a covenant that the trustee named therein should, at a request of a majority of the bondholders, purchase the premises at a sale thereunder, for the benefit of the bondholders, and organize a new company, it was held to be proper to decree, on a foreclosure of the mortgage, that the trustee should be authorized and directed to bid at the sale, as trustee for first-mortgage bondholders, at least the amount of the principal and interest of the first-mortgage bonds.²

§ 794. **The same subject continued.**— When there is nothing in the plan proposed that is, of itself, illegal or expressly prohibited by statute, the stockholders who are present at the time of the discussion of its adoption and who voted for it, are thereafter estopped from attacking it on the ground that it is *ultra vires*, for a corporate act not prohibited by law, for the performance of which there is only want of power, may afterwards be made good by the ratification of the stockholders.³ And the assignee of stockholders who voted for the ratification of a reorganization plan can not thereafter complain that there was want of power, provided there is no legal objection.⁴ So, also, where a plan of reorganization of a railroad company

¹ Hoyle v. Plattsburgh &c. Ry. Co., (1873) 54 N. Y. 314; Jackson v. Ludeling, 21 Wall. 616, 625; Munson v. Syracuse &c. R. Co., 29 Hun, 76; Harts v. Brown, 77 Ill. 226. But see Twin Lick Oil Co. v. Marbury, 91 U. S. 587.

² Sage v. Central R. Co., (1878) 99 U. S. 334. In foreclosure proceedings permission is usually granted by the court to the bondholders to buy in the property and pay for it with their bonds. Ketchum v. Duncan, 96 U. S. 659; Kropholler v. St.

Paul &c. R. Co., 1 McCrary, 301; s. c.

³ 2 Fed. Rep. 304. And the court may decree that any person other than the mortgage trustee who shall purchase the property at the sale shall make an immediate payment in cash of a part of his bid, by way of earnest. Sage v. Central R. Co., 99 U. S. 334.

⁴ Kent v. Quicksilver Mining Co., 78 N. Y. 186.

⁴ Kent v. Quicksilver Mining Co., 78 N. Y. 186.

has been presented to and ratified by the stockholders at an annual meeting, and a majority of the stockholders have subscribed for stock in pursuance of the scheme, a plaintiff, who has acquired his stock since the adoption of the plan from stockholders who voted in favor of it, can not, where nothing in the plan is expressly prohibited by statute, insist that the plan is *ultra vires*, nor ask a court of equity to enjoin the officers of the corporation from doing what his predecessors, as owners, expressly authorized.¹ On the other hand, although, where the foreclosure proceedings have reached the stage at which a sale is had, without an agreement between bondholders and stockholders, the rights of the latter are barred, yet, if there has been an agreement, the stockholders may maintain an action for damages for a breach thereof.² And if the trustee of the mortgage, in whose name the foreclosure proceedings are had, is under contract with the bondholders, he is liable to them for a breach of trust in case he fails to perform.³ Where there is an agreement between the stockholders of a corporation and its creditors for reorganization of the company, and the issue of new stock in lieu of the old, on condition that the old stockholders pay an assessment sufficient to discharge the floating debt, and another corporation is designated to make the assessment and distribute the stock,

¹ *Hollins v. St. Paul &c. R. Co.*, (N. Y. Sup. Ct. 1890) 6 Ry. & Corp. L. J. 493. Upon a motion for a preliminary injunction enjoining the proceedings for reorganization, Ingraham, J., said: "I do not think as against either the corporation or the persons who relying upon the action of the stockholder have subscribed for the capital stock of the new company to carry out the plan proposed, the plaintiff can now insist that the proposed plan is *ultra vires*, or at any rate is in such a position as to ask a court of equity to enjoin the officers of the corporation or the corporations defendants from doing what his predecessors, as owners of the stock, expressly authorized and directed the officers of

the company to do. Whether or not a preliminary injunction should be granted in such an action is largely in the judicial discretion of the court; and where a single stockholder owning a very small proportion of the stock of the corporation, seeks to restrain a corporation from doing an act ratified by a large majority of the stockholders, he must present to the court a clear legal right to the relief demanded, and show that the injunction he asks for is essential to the preservation of his legal rights."

² *Marie v. Garrison*, (1880) 83 N. Y. 14.

³ *James v. Cowing*, (1880) 82 N. Y. 449.

it has no arbitrary power to fix the assessment, but is charged with a trust duty, and the stockholders may enjoin the distribution of the stock until the determination of their rights under the agreement.¹ There is some conflict of opinion as to whether a majority of the mortgage creditors may legally bind the minority by the provisions of an agreement for reorganization. In a case in Connecticut this right has been upheld.² On the other hand, in a more recent case in New York it was held that a scheme of reorganization can only be made effective by the consent of all the bondholders or by a foreclosure cutting off their lien; that even a single bondholder may stand upon his rights as stated in the contract, and that the trustees had no power to make a new one for him.³ Where, however, the mortgage provides that the majority of the bondholders should decide the terms of reorganization, the minority are, of course, bound by the contract.⁴

§ 795. Transmission of property rights and franchises.—

The purchasers acquire only such property as was covered by the mortgage; and a statute incorporating the purchasers at a foreclosure sale and vesting in them all the right, title, interest, property, possession, claim, and demand at law or in equity "of the corporation as whose property the same was sold," does not vest in the new company any title to a judgment obtained by the old company, not covered by the mort-

¹ *Gernsheim v. Olcott*, (1890) 7 N. Y. Sup. 872.

² *Gates v. Boston &c. R. Co.*, (1885) 53 Conn. 333; *Shaw v. R. Co.*, 100 U. S. 605. *Cf.* *Canada Southern Ry. Co. v. Gebhard*, 109 U. S. 527. The court said: "In making this claim the plaintiff ignores, or subordinates to his own claim, both the private rights of his co-bondholders and the public rights vested in trust in the State, while upon every true theory and exposition of his contract, the rights of the public are superior to his private rights, and the rights and interests of his co-bondholders are equally with his own to be protected

by the law. The plaintiff's argument treats this matter as one of strict legal private right of an individual creditor against or to private property of an individual debtor, instead of a claim of exceptional character upon property of a peculiar nature, in which private rights of others and the right of the public exist, which must be regarded and protected."

³ *Hollister v. Stewart*, 111 N. Y. 644, distinguishing *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, cited *supra*.

⁴ *Sage v. Central R. Co.*, 99 U. S. 334.

gage under which the property was sold. For the grant must be interpreted as having relation to what was sold and not to that which was not, and could not have been legally sold under the decree of foreclosure.¹ It is upon this principle also that the purchasers are held not to acquire corporate existence; for a corporation can not, without legislative authority, alienate or mortgage its franchise to be a corporation;² and accordingly purchasers at the foreclosure sale do not acquire the franchise of corporate entity,³ independently of statutory authority.⁴ Other franchises, however, which are capable of alienation and mortgage do pass under a foreclosure sale and vest in the purchasers.⁵ In the case of *quasi*-public corporations, when such franchises as the right of eminent domain or the right to maintain and operate a railway are transferred by virtue of foreclosure proceedings, the purchasers take them subject to the obligations to the public which their possession imposes. "The public have an interest in the continuous user of the railroad, its franchises and corporate property, in the manner and for the purposes contemplated by the terms of the charter; and upon principle it would seem plain that railroad property, once devoted and essential to public use, must remain pledged to that use, so as to carry to full completion the purpose of its creation."⁶ The property of a religious corporation, dissolved by reason of the expiration of its charter, vests in its members, who may re-incorporate; and the new corporation may sue for breach of a condition relating to the premises, espe-

¹ *Wilmington &c. R. Co. v. Downward*, (Del. 1888) 4 Ry. & Corp. L. J. 234, 236.

² *Vide* § 738, *supra*, and cases cited *supra*, p. 587, note 1, and p. 589, note 1.

³ *Metz v. Buffalo &c. R. Co.*, 58 N. Y. 61; *Wellsborough &c. Plank R. Co. v. Griffin*, 37 Pa. St. 417; *People v. Cook*, (1888) 110 N. Y. 443, where the court said: "The right to be a corporation, which the old corporation had, was not mortgaged and was not sold, and did not pass to the purchasers, and they only obtain such a right upon filing the cer-

tificate mentioned, and then they obtain it by direct grant from the State, and not in any degree by the sale and purchase of the franchises of the old corporation."

⁴ In Texas this authority is given by *Tex. Rev. Stat. art. 4260*. *Cf. Acres v. Mayne*, 59 Tex. 625. And it has been conferred in other cases. See 1 *Rorer on Railroads*, 257, and cases cited *supra*, p. 589, note 2.

⁵ *People v. O'Brien*, (1888) 111 N. Y. 1; *Marshall v. Western North Carolina R. Co.*, 92 N. C. 322.

⁶ *Yates v. Boston &c. R. Co.*, (1885) 53 Conn. 333.

cially where it has been in possession and has managed the property without objection for many years.¹

§ 796. Liability of the new company.—The debts, liabilities, contracts and torts of the old company are not necessarily assumed by the purchaser.² Thus, where a mortgage on the property and franchises of a corporation is foreclosed, and purchasers at the sale reorganize under the name of the original corporation, neither they nor the property become liable for its debts.³ And it is held that even when it is provided by statute

¹ *Congregation of the Roman Catholic Church of the Ascension v. Texas & Pacific Ry. Co.*, (1890) 41 Fed. Rep. 364; s. c. 7 Ry. & Corp. L. J. 477.

² *St. Louis & C. R. Co. v. Miller*, 43 Ill. 199; *Memphis Water Co. v. Majews*, 15 Lea, 37; *Cook v. Detroit & C. Ry. Co.*, 43 Mich. 349.

³ *Memphis Water Co. v. Majews*, 15 Lea, 57. A plan of reorganization providing for the issue of second preferred income bonds of the new company at par (secured by a second mortgage) to the holders of the floating debt of the old company in place of their surrendered evidences of indebtedness, was sustained as against one of the holders of the floating debt charging that it was inequitable and seeking to have the stock of the new company provided in the agreement to be issued to the stockholders of the old company, placed in the hands of a receiver and sold, and the proceeds applied to the payment of his claim and of such other creditors as should come in and be made parties; the court saying, "it was the evident purpose of the parties to this agreement to place these floating debt holders in at least as good a relation to the new company as they bore to the old company. They got for their unsecured indebtedness something which at least bears the resemblance of a se-

curity. It was a second mortgage bond. . . . The plan adopted had what seems to have been a due and equitable regard to the interests of all classes of creditors and stockholders, and it does not seem that upon the statements in this bill any injustice was intended or has been done to this creditor." *Hancock v. Toledo & C. R. Co.*, 9 Fed. Rep. 738, 742. Where an order of court made the purchase price of rolling stock bought by its receiver a first lien "upon the mortgaged premises," although it also authorized its payment out of the proceeds of sale, it was held that, there being no proceeds of sale, the mortgage bondholders having bought in the property by surrendering their bonds, the purchasers could claim to have the premises discharged from the lien. And it was said "if the purchasers on the sale, whether bondholders or third persons, had paid the purchase-money in cash or secured its payment, there would, we conceive, be no doubt that the lien would be transferred to the proceeds. There would then be a substitute for the thing sold, upon which the lien would attach, relieving the land in the hands of the purchasers. But it could not have been the intention of the court to make a constructive payment on a purchase by the mortgagees, through a cancellation of the

or by the mortgage that the stockholders of the old company may obtain an interest in the new, the latter is not thereby made liable for the former's debts.¹ Neither is a new company formed by the purchasers at foreclosure sale liable on the contracts and torts of the former company.² Thus when the old company had bound itself by an agreement not to extend its railroad in a certain direction, the new corporation is not bound by this agreement if its charter permits the extension.³

§ 797. The same subject continued.—Cases holding that the reorganized company is not liable upon the contracts and obligations of its predecessor, are usually those in which the reorganization has resulted from foreclosure proceedings by which all equities have been quieted; and the rule does not apply where the sale has been decreed subject to existing liens, nor where the purchasers at foreclosure sale have taken with knowledge of incumbrances;⁴ nor does it apply where the property of the old company has been otherwise acquired than in foreclosure proceedings. In the latter event it may still be reached by creditors of the former owner, although it has passed into the hands of a reorganized company,⁵ and the new

mortgage debt, equivalent to an actual payment, so as to relieve the property from the charge." *Vilas v. Page*, 106 N. Y. 439, 454, 455.

¹*Sullivan v. Portland &c. R. Co.*, 94 U. S. 806; *Smith v. Chicago &c. R. Co.*, 18 Wis. 17; *Marshall v. Western North Carolina R. Co.*, 92 N. C. 331. See, however, *University v. Moody*, 62 Ala. 389; *Francklyn v. Sprague*, 121 U. S. 215.

²*Metz v. Buffalo &c. R. Co.*, 58 N. Y. 61; s. c. 17 Am. Rep. 201; *Pittsburgh &c. R. Co. v. Fierst*, 96 Pa. St. 144; *Secombe v. Milwaukee &c. R. Co.*, 2 Dill. 469; *Hopkins v. St. Paul &c. R. Co.*, 2 Dill. 396; s. c. 17 Am. Rep. 201; *Wellsborough &c. Plank Road Co. v. Griffin*, 47 Pa. St. 417.

³*City of Menasha v. Milwaukee &c. R. Co.*, 52 Wis. 420.

⁴*Swanson v. Wright*, 110 U. S. 590; *Williams v. Morgan*, 111 U. S. 679; *Vilas v. Page*, (1887) 106 N. Y. 439; *Commonwealth v. Susquehanna &c. R. Co.*, (Pa. 1888) 4 Ry. & Corp. L. J. 570.

⁵*Marshall v. Western North Carolina R. Co.*, 92 N. C. 322; *Brum v. Merchants' Mut. Ins. Co.*, 16 Fed. Rep. 140; *City of Menasha v. Milwaukee &c. R. Co.*, 52 Wis. 420. Cf. *Child v. New York &c. R. Co.*, 129 Mass. 170; *Welfley v. Shenandoah &c. Co.*, 83 Va. 768, holding that a mere change of name does not constitute a new company; *Marshall v. Western North Carolina R. Co.*, 92 N. C. 322, holding that where there is in effect an organization of a new company a retention of the old name is immaterial. An agricultural society whose object, according to its

company may still be liable upon the contracts of the old.¹ Thus where several corporations are united in one, and the property of the old companies vested in the new, the latter is liable both at law and in equity for the debts of the former, at least to the extent of the property received from them, the remedy at law not being exclusive.² Again the conversion of a trading company acting as a corporation *de facto* into one *de jure* will not exempt the property held in the

constitution, was "to improve the condition of agriculture, horticulture, and the mechanic and household arts," was reorganized into a joint-stock company, "to improve the condition of agriculture, horticulture, floriculture, mechanic and household arts," the name being changed only by substituting the word "board" for "society." The old society provided for holding annual fairs, and the new for annual fairs and exhibitions. It was held that there was no substantial change in the objects of the society; and the new one, continuing still a public institution, was liable only to the extent of its corporate property. *Livingston County Agricultural Society v. Hunter*, 110 Ill. 155. Where an insolvent banking corporation transfers all its assets, including its name and franchise, to a new association, under an agreement by which the latter is to pay a composition agreed on by the former with most of its creditors, but is to be repaid any amount in excess of the composition rate which it may be obliged to pay to the non-assenting creditors, and such new association assumes the name of, and carries on the banking business in the office theretofore occupied by, the old association, and claims its franchise and uses its seal, there is mere change of membership, and not a new corporation, and the new corporation is

liable to creditors who did not accept the composition. *Island City Sav. Bank v. Sachtleben*, 67 Tex. 420.

¹ *Rutten v. Union Pacific R. Co.*, 17 Fed. Rep. 480. An insurance company being in embarrassed circumstances, a plan of reorganization was determined upon, and a new company was formed, which agreed to lend defendants, who were stockholders in the old company, ten thousand dollars to pay off its debts; and thereupon the defendants executed a bond to indemnify the new company against loss on account of the liabilities of the old company, and bound themselves to pay off any losses to the extent of sums unpaid on their subscriptions to stock. It was held that there was sufficient consideration to support the bond, and that although the company was organized on the mutual plan, yet the charter providing that, for the better security of policy-holders, the company may add thereto a guaranty or stock capital, not exceeding two hundred thousand dollars, this bond is to be considered as a guaranty, under this provision, for the payment of the debts and liabilities of the old company by the defendants, to the extent of amounts unpaid on their subscriptions to stock. *Planters' Ins. Co. v. Wicks*, (Tenn. 1887) 4 S. W. Rep. 172.

² *Harrison v. Arkansas Valley Ry. Co.*, 4 McCrary C. Ct. 264.

latter character from liability to the obligations in the former.¹ In a Michigan case in point a company whose members supposed themselves to be incorporated, issued paper in its corporate name, but afterwards finding that they were not properly organized, dissolved, and were legally incorporated under a different name; and it was held that the new company could not repudiate the paper.² In a recent case in Louisiana it was held that the stockholders of a corporation, in the name of which property has been bought on credit, can not form a new corporation in which their interests are the same as in the old, and based on no new consideration, and, by transferring the property to the new corporation, escape liability to the vendor and creditors to the value of the property.³

¹ Georgia Ice Co. v. Porter, 70 Ga. 637.

³ Hancock v. Holbrook, (1888) 40 La. Ann. 53.

² Empire Manuf. Co. v. Stuart, 46 Mich. 482.

CHAPTER XL.

TAXATION OF CORPORATIONS.

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| <p>§ 798. Introductory.</p> <p>799. Franchise tax.</p> <p>800. Property tax.</p> <p>801. Franchise and property tax distinguished.</p> <p>802. Taxation of capital stock —
 (a) In general.</p> <p>803. (b) Less property exempt from taxation.</p> <p>804. (c) Less property otherwise taxed.</p> <p>805. (d) Less the company's debts.</p> <p>806. Taxation of securities and loans.</p> <p>807. Taxation of business, earnings, or dividends — (a) In general.</p> <p>808. (b) Gross receipts.</p> <p>809. (c) Net earnings.</p> <p>810. (d) Dividends.</p> <p>811. Tenure of property as affecting liability for taxes.</p> <p>812. Taxation of banks — (a) Who are bankers.</p> <p>813. (b) National banks.</p> <p>814. (c) Savings banks.</p> | <p>§ 815. Railway and transportation companies.</p> <p>816. Bridge companies.</p> <p>817. Foreign corporations — (a) The power to tax.</p> <p>818. (b) "Doing business" construed.</p> <p>819. (c) Movable property of foreign corporations.</p> <p>820. (d) Discriminations.</p> <p>821. (e) Interstate railway and transportation companies.</p> <p>822. (f) Sleeping and parlor car companies.</p> <p>823. (g) Telegraph and telephone companies.</p> <p>824. Taxation of shareholders —
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§ 798. Introductory.— A tax on the shares of stockholders in a corporation is a different thing from a tax on the corporation itself or its stock, and may be laid irrespective of any taxation of the corporation where no contract relations forbid.¹ There are four principal methods of taxing corporations in vogue in America, varying in detail in the different States.²

¹ Cooley on Taxation, 2d ed. 231.

² See generally upon the subject: "System of Taxation," (Harrisburg, 1890) by John A. Wright, being a memorandum submitted to the committee for revision of the revenue

laws of Pennsylvania; "Careless Legislation on Corporate Taxation," by Edward Lynian Short, 29 Alb. L. J. 105; "Corporate Taxation," by Edward C. Moore, Jr., (1884) 18 Am. L. Rev. 749; "Taxation of Corpora-

These are, first, upon the corporate franchise,¹ second, upon the corporate property,² third, upon the capital stock,³ and fourth, upon the business done or profits accruing therefrom.⁴ An erroneous construction of the tax laws by officers whose duty it is to enforce them, does not bind their successors, nor the State in the proper assessment and collection of taxes, although the erroneous construction may have been followed from the time the laws were enacted.⁵ The State may recover judgment against a railroad company for taxes due upon the gross earnings of the road, notwithstanding the road has been placed in the hands of receivers, who were operating it and controlling its earnings during the time for which the taxes were levied.⁶ And a claim of the State for taxes upon the franchise of a corporation, which in the possession of a receiver continues to be a going concern, is superior to the rights of mortgage bondholders, and the court may order it to be paid out of the gross earnings in the receiver's hands.⁷

§ 799. Franchise tax.—The franchise tax is a license fee charged for the privilege of incorporation, or of doing business as a corporation in the State. It is generally proportioned to the amount of the capital stock, but is not to be confounded

tions under New York Laws of 1881," 28 Alb. L. J. 246; "Taxation of Corporations," by Prof. E. R. A. Seligman, (1890) 5 Polit. Science Quart. 269, 439, 637, being a series of articles tracing the history of tax legislation in the American States, criticising the present methods, suggesting remedies for evils existing, and concluding with a valuable bibliography of the subject; "Tax on Bodies Corporate and Unincorporate," 30 Sol. J. & Rep. 23; "Taxation of Real Property and Corporations," by John H. Ames, 12 West. Jur. 140; "Letters on Corporations and Taxation," (New York, 1878) by James H. Coleman; "Taxation of Real Property and Corporations," (Des Moines, 1878) by John H. Ames.

¹ *Vide infra*, § 799.

² *Vide infra*, § 800.

³ *Vide infra*, §§ 802-805.

⁴ *Vide infra*, §§ 807-810.

⁵ *Lee v. Sturges*, (1889) 46 Ohio St. 153. The erroneous construction in this case was that shares held by residents of Ohio of stock of foreign railroad corporations having property in that State on which they pay taxes, and of consolidated railroad companies, are not taxable in Ohio.

⁶ *Philadelphia &c. R. Co. v. Commonwealth*, 104 Pa. St. 80; *Beach on Receivers*, 335.

⁷ *Central Trust Co. v. New York &c. R. Co.*, 110 N. Y. 250, citing *In re Receivership of Columbian Ins. Co.*, 3 Abb. Ct. of App. Dec. 239, and *Union Trust Co. v. Illinois Midland R. Co.*, 117 U. S. 434; and distinguishing *Commonwealth v. Lancaster Savings Bank*, 123 Mass. 493.

with the tax upon the capital stock.¹ In Connecticut the corporate franchise tax applies only to foreign corporations seeking a charter in the State.² In New York it is called the "organization of corporations tax;"³ in Maine, the "tax on new corporations;"⁴ in Missouri, the "corporation tax," or the tax on "corporations incorporating;"⁵ in New Hampshire, "charter fees;"⁶ in New Jersey, the tax from "certificates of incorporation;"⁷ in Pennsylvania and Rhode Island, the "bonus on charters;"⁸ and in West Virginia, it is designated the "license tax on charters and certificates of incorporation."⁹

§ 800. Property tax.—The taxation of corporations upon their property, real or personal, was the method originally prevalent in the American States, and is still adhered to by many of them.¹⁰ Thus, in New Jersey railway companies are taxed by the State for local purposes upon the value of their real estate in each taxing district outside of the main line, at the local rate, provided that be not greater than one per cent. of the value.¹¹ In most of these States the tax is based upon the present value of the corporate property, while in others the cost of the property is taken as the basis of estimate.¹² The

¹ "Taxation of Corporations," by Prof. E. R. A. Seligman, (1890) 5 Pol. Science Quart. 269, 305; State v. Stonewall Ins. Co., (Ala. 1890) 8 Ry. & Corp. L. J. 308, where this distinction is shown to be important. *Vide infra*, § 801; Cooley on Taxation, 22, 23; Desty on Taxation, 76.

² Conn. Gen. Stat. §§ 1912-1916.

³ Payable also on subsequent increase of the capital stock. N. Y. Laws of 1886, ch. 143.

⁴ Me. Rev. Stat. ch. 43, § 18; Me. Pub. Laws of 1887, ch. 90.

⁵ Mo. Const. art. x, § 21; Mo. Rev. Stat. § 2493.

⁶ N. H. Gen. Laws, ch. 13, § 5.

⁷ N. J. Pub. Laws of 1883, 62; Revision of N. J. Supl. 149.

⁸ Pa. Laws of 1868, § 15, p. 113; Pa. Laws of 1874, § 44, p. 107; R. I. Pub. Stat. ch. 27, § 15.

⁹ W. Va. Code, ch. 32, §§ 86-92, as

amended by W. Va. Laws of 1887, ch. 29.

¹⁰ Cooley on Taxation, 223, 377, 383. *E. g.* Cal. Civ. Code, § 3608; Conn. Gen. Stat. (1888) §§ 3832, 3833; La. Laws of 1886, p. 132. In Colorado railway real estate is taxed where it lies. Colo. Gen. Stat. § 2847. And other railway property is taxed by the municipalities upon a valuation determined by the State. Colo. Gen. Stat. § 2847. In Iowa the real and personal property of manufacturing companies is taxed, the shares being exempt. Iowa Rev. Code, (1888) p. 273. Railway property valued according to earnings per mile. Iowa Rev. Code, (1888) §§ 1317-1322.

¹¹ N. J. Law of March 27, 1888.

¹² Cooley on Taxation, 223, 377, 383, and statutes cited *supra*. In fixing the value of the real estate of the Panama Railroad Company the

latter rule still prevails in the local taxation of telegraph companies in New York.¹

§ 801. Franchise and property taxes distinguished.—Owing to the difficulty of distinguishing between the capital and the property in which it is invested, tests for determining whether a tax is on the property or the franchises may be regarded, generally, as uncertain and unsatisfactory; yet its determination is often necessary, for, if a franchise tax, the property in which the capital is invested becomes immaterial. The usual and most certain test is whether the tax is upon the capital stock, *eo nomine*, without regard to its value, or at its assessed valuation in whatever it may be invested. If the former, it is a franchise tax; if the latter, a tax upon the property.² In Mississippi there is a tax on banks called a privilege tax, the amount varying with their capital stock or assets. This is in lieu of all other taxes, and, accordingly, real estate owned by banks is accounted a part of their assets.³ Under the Pennsylvania statute,⁴ entitled "An act to enable the city of Pittsburgh to raise additional revenue," and prescribing that all real estate situated in that city owned or possessed by any railroad company should be subject to

commissioners of taxes took the cost of its real estate and improvements, consisting principally of the cost of construction of the road. Upon *certiorari* to correct the assessment, the company offered no evidence of the market value of its real estate, but introduced an estimate based on the capitalization of the company's average annual net income for several years preceding, making a deduction of the value of personal property. But it was decided that the latter estimate ought not to be taken, as it failed to exclude the value of the company's franchise, and that the commissioners' action should be sustained. *People v. Commissioners of Taxes*, (1887) 104 N. Y. 240.

¹ N. Y. Laws of 1853, ch. 597.

² *State v. Stonewall Ins. Co.*, (Ala. 1890) 8 Ry. & Corp. L. J. 303, citing

Bank v. New York City, 2 Black, 620, and holding that Ala. Code, § 478, requiring that the chief officer of such a corporation shall make return of all taxable property, stating the number of shares of stock, their par and market value, and the items of property in which its capital stock is invested, was not intended to be determinative of the character of the capital stock, but only to prescribe a method of listing the property of the corporation, and furnish data from which to ascertain the assessable value of whatever its capital was invested in. *Cf. Desty on Taxation*, 76.

³ *Vicksburg Bank v. Worrell*, (Miss. 1890) 7 So. Rep. 219, construing Miss. Code, §§ 557, 585, as amended by Miss. Laws of 1888.

⁴ Pa. Act of Jan. 4, 1859.

taxation for city purposes, in the same manner as other real estate in the city, the land, buildings and improvements of the railway companies were held subject to taxation, even though necessary to the exercise of the franchises of the respective companies.¹

§ 802. Taxation of capital stock — (a) In general.—There are eight methods of taxing the capital stock of corporations,² to wit: a tax upon the capital stock when the company during any year makes dividends amounting to six per cent. or more on the par value of its capital;³ a tax upon the whole capital stock at par;⁴ upon the capital stock at its actual cash or market value;⁵ upon so much of the capital stock as has been subscribed to and paid in;⁶ upon the capital stock plus the bonded debt of the company at market value;⁷ upon the capital stock plus the total debt, both funded and floating;⁸ upon

¹ *Pennsylvania R. Co. v. Pittsburgh*, (1886) 104 Pa. St. 522.

² See generally "Assessments of Capital Stock and Franchise of Corporations," by James K. Edsall, 7 Chicago L. N. 390; Desty on Taxation, 73; Cooley on Taxation, 230, 232.

³ N. Y. Laws of 1880, ch. 542, § 3, as amended by N. Y. Laws of 1881, ch. 361. Under this act and N. Y. Laws of 1882, ch. 151, which authorizes the comptroller, upon becoming dissatisfied with the report of any corporation, liable to this tax, whose capital is only partly employed within the State, to fix the amount of capital stock which shall be the basis for the tax, it has been held that the latter statute does not require that only the capital employed in the State shall be taken as a basis; that this basis is authorized only when the report of the corporation fails to satisfy the comptroller; and that where no such dissatisfaction appears, the rule under the former statute prevails. *People v. Horn Silver Mining Co.*, 105 N. Y. 76.

Where a bridge owned by a corporation was duly declared a county bridge, the surplus of the damages assessed over the amount of capital stock, which was divided among the stockholders, was in the nature of profits, and a proper measure of the tax upon the capital stock. *Matson's Ford Bridge Co. v. Commonwealth*, (Pa. 1888) 11 Atlan. Rep. 813, not reported.

⁴ *E. g.* Corporations in general. N. J. Act of April 18, 1884.

⁵ At its market value: Ind. Rev. Stat. (1887) §§ 6357, 6359; Ala. Civ. Code, § 453, subs. 8; Conn. Gen. Stat. §§ 3919, 3920. At its true value: Kan. Comp. L. p. 9481, § 12. At its actual value: Md. Laws of 1878, ch. 178. At its cash value: Ill. Rev. Stat. ch. 120, § 3.

⁶ Thus in Maryland and Louisiana, the corporation is required to pay the tax upon its shares, collecting it again from the shareholders. Md. Laws of 1878, ch. 178; La. Laws of 1886, p. 132.

⁷ *Vide infra*, § 806.

⁸ *Vide infra*, § 806. *E. g.* Conn.

the capital stock less property otherwise taxed;¹ and upon the capital stock less the indebtedness of the corporation.² When the tax is upon the market value of the capital stock, evidence of the value of the shares when they have been withdrawn from the market may be ascertained from other sources; and, when they have been exchanged for other securities, the value fixed upon them in the exchange is a proper basis for the assessment.³ Under the New York statute providing that if a corporation, during any year, makes dividends amounting to six per cent. or more on the par of its capital, then it is to pay a tax of one-quarter mill on the capital stock for each one per cent. of dividends; but if there are no dividends, or the dividends are less than six per cent., then the tax shall be at the rate of one and a half mills on each dollar of the value of the stock, it is held that it was the clear intention of the statute, where the dividend was less than six per cent. on the par value of the stock, that the tax should be one and a half mills on the actual value of the stock, although the aggregate tax would be greater than a tax computed on a dividend of six per cent.⁴ Under a statute taxing the capital stock, after deducting therefrom the value of the company's real estate, the corporate franchise is not to be accounted real estate unless it be so defined by the statutes.⁵

§ 803. (b) Less property exempt from taxation.—When a tax upon the capital stock is regarded as a tax upon property, the question then is whether, under the revenue law, the corporation is entitled to a deduction from the assessed value of its capital stock of such portion as is invested in bonds of

Gen. Stat. §§ 3919, 3920, taxing the stock of railway companies and also their funded and floating debts, less obligations held in trust as a sinking fund and less the tax on realty.

¹ N. Y. Laws of 1857, ch. 456, § 3. *Vide infra*, § 804; Conn. Gen. Stat. §§ 3919, 3920; Ala. Civ. Code, § 453, subs. 8; Ill. Rev. Stat. ch. 120, § 3. Less real and personal property in the State: Kan. Comp. L. p. 9481, § 12.

² *Vide infra*, § 805.

³ *Planters' Crescent Oil Co. v. Assessor of the Parish of Jefferson*, (La. 1890) 6 So. Rep. 809.

⁴ *People v. Delaware & H. Canal Co.*, (1890) 7 N. Y. Supl. 890, construing N. Y. Laws of 1880, ch. 542, § 3, as amended by N. Y. Laws of 1881, ch. 361.

⁵ *People v. Commissioners of Taxes*, (1887) 104 N. Y. 240, construing N. Y. Rev. Stat. ch. 13, tit. 1, § 2, and N. Y. Laws of 1857, ch. 456, § 3.

the State. It is contended that no deduction can be made under the statute, except of such portions as may be invested in property otherwise taxed. The argument is that the capital stock includes everything in which it is invested, and that expressly excepting the portion of its investments in property otherwise taxed is the exclusion of such portions as may be invested in property non-taxable. But unless a deduction from the assessed value of the capital stock of the portion invested in bonds of the State is allowed, then there exists the anomaly of taxing, in the form of capital stock, investments expressly exempted from all taxation. "If a part of the money capital of an individual be invested in State bonds, it will be conceded that such part is not liable to taxation. Why then should it be held that the portion of the capital of corporations so invested is taxable?"¹ So that it is held that the section of the Alabama Code providing that the capital stock of private corporations shall be taxable, except so much thereof as may be invested in property otherwise taxed, was only intended to prevent double taxation of taxable property, and does not render taxable such portion of the capital stock of an insurance company as is invested in Alabama State bonds; which, by another section, are made non-taxable.² And in accordance with the distinction above explained between taxation of capital stock at its par value and assessing it at its market value, it is held by the federal Supreme Court that the capital stock of an insurance company, invested in United States bonds, exempted by the acts of congress under which they were issued from taxation by the States, is not exempt from the tax imposed by the New York statute, on the "corporate franchise or business of corporations in that State, of one-quarter mill on the capital stock for each one per cent. of dividend of six per cent. or over."³ Under the Louisiana act,

¹ *State v. Stonewall Ins. Co.*, (Ala. 1890) 8 Ry. & Corp. L. J. 308; Monographic Note "Taxation of Banking Capital Invested in United States Bonds," 3 Am. L. Reg. (N. S.) 535.

² *State v. Stonewall Ins. Co.*, (Ala. 1890) 8 Ry. & Corp. L. J. 308, construing Ala. Code, § 453, subd. 9, and § 451, subd. 2.

³ *Home Ins. Co. v. New York*, (1888) 119 U. S. 129, construing N. Y. Laws of 1880, ch. 542, as amended by N. Y. Laws of 1881, ch. 361, and holding further that this act is not unconstitutional as depriving any person, natural or artificial, of the equal protection of the laws; for, under its provisions, all corporations

relating to taxation of national bank shares, making no deduction for that part of the bank's property entering into their value which consists of non-taxable State and federal securities, which deduction may, under the act, be made by individuals, the tax violates the federal statute prohibiting the assessment of shares of national banks at a greater rate than moneyed capital in the hands of individual citizens, and it is immaterial that the same discrimination is made against other corporations.¹

§ 804. (c) Less property otherwise taxed.—Statutes taxing the capital stock of corporations frequently allow for the exemption of so much thereof as may be invested in property otherwise taxed.² Thus in New York corporations taxed upon their capital stock are entitled to deduct from the amount thereof the assessed value of real estate and shares in other companies otherwise taxed.³ The object of this exemption is

of the same kind are subject to the same tax. In the *Bank Tax Case*, 2 Wall. 200, it was ruled that a tax laid on banks, on a valuation equal to the amount of their capital stock paid in, or secured to be paid in, is a tax on the property of the institution, and when that property consists of stocks of the federal government, the law levying the tax is void. In *Maguire v. Board of Revenue*, 71 Ala. 401, Stone, J., says: "But a tax on the capital stock of a bank whose capital is invested in government securities, not allowed to be taxed, would be a tax on such securities, and illegal."

¹ *Whitney Nat. Bank v. Parker*, (1890) 41 Fed. Rep. 402, construing La. Act of 1888, § 27, and U. S. Rev. Stat. § 5219.

² *E. g.* Ala. Code, § 453, subd. 9; Vt. Rev. Laws, § 288.

³ N. Y. Laws of 1857, ch. 456, § 3, which provides: "The capital stock of every company liable to taxation, except such part of it as shall have

been excepted in the assessment roll, or as shall have been exempted by law, together with its surplus profits or reserved funds exceeding ten per cent. of its capital, after deducting the assessed value of its real estate and all shares of stock in other corporations actually owned by such company, which are taxable upon their capital stock under the laws of this State, shall be assessed at its actual value, and taxed in the same manner as other personal and real estate of the county." In *People v. Commissioners of Taxes*, (1887) 104 N. Y. 240, it is held that in *certiorari* to correct an assessment of the capital stock of a corporation made by the commissioners of taxes, it is incumbent upon the company, before it is entitled to call upon the court to correct the assessment by increasing the sum to be deducted for the value of its real estate, to give evidence and furnish data showing that the actual value exceeded the sum fixed by the commissioners.

to avoid double taxation.¹ And when the stock of a corporation does not exceed in value the property which it represents, all of which is assessed to the corporation, it should not be assessed to the stockholders under the provisions of the Vermont statute providing for deducting from the value of the stock the value of the real and personal property of the corporation represented by the stock and itself taxed.² It is immaterial what the cost of the real estate otherwise taxed may have been; it is only the actual present value thereof which may be deducted.³ If the realty be situated in a foreign State and the valuation assessed there can be ascertained, it will be adopted in New York, on the ground that to take the assessed value of real property in another State, where it is practicable and convenient to ascertain the facts, as the actual value, in the absence of some controlling circumstance which shows the contrary, is more apt to work substantial justice than any other mode.⁴ Where an assessment is made which states, and

¹ *State v. Stonewall Ins. Co.*, (Ala. 1890) 8 Ry. & Corp. L. J. 308.

² *Willard v. Pike*, (1887) 59 Vt. 202.

³ *People ex rel. Fairfield Chemical Co. v. Commissioners of Taxes*, (1889) 52 Hun, 93; s. c. 6 Ry. & Corp. L. J. 172.

⁴ *Ex rel. Fairfield Chemical Co.*, (1889) 52 Hun, 93; s. c. 6 Ry. & Corp. L. J. 172, *supra*. In this case Peckham, J., continued: "The general purpose of statutes relating to assessment and taxation is to bring within their grasp all property at its actual value. When the real estate is within our own jurisdiction, the assessed is regarded as the actual value thereof. Generally, the same theory holds good in regard to real property which is situate without the State. If the real property of the relator were situate here, the assessed value of the real property, \$42,400, would of course be the sum to be deducted from the value of the capital stock, even though \$150,000 had been paid for such property. By the relator's contention it is to have

the benefit of a deduction of \$150,000 from the value of its capital stock, simply because its real property which is the cause of the deduction is situated in Connecticut, although it is only taxed there at a valuation upon such real estate of \$42,400. We think that sum may properly be assumed to be its value. Otherwise, such a corporation is in a very much better position than one whose real property is held within our own State. If the relator's real property were held here, and subjected to precisely the same assessment as it is in fact in Connecticut, it is not questioned but that the balance of its taxable property would be, as stated by the defendants, \$32,600; yet, because of the simple fact that the real property is held just over our border and the same assessment is made, the resulting difference is that the relator has no taxable property. This is not just. The result is obtained by assuming that an assessed valuation in another State under a general tax law is no evi-

which is based upon the value of real estate, in the absence of any other fact controlling it, the theory is that the assessed value of the real property is its actual value. This holds good in regard to an assessment outside as well as within the State; and, in regard to assessments outside the State, they are to be regarded as evidence of the actual value. It is not necessary, in all cases, to regard an assessment as conclusive when made outside of the State; and it may not always be necessary or practicable to learn if there be any such assessment; but if it be known, then, in the absence of other evidence upon the subject, an assessed value is sufficient evidence of actual value for the taxing officers to act on. If there be other evidence the question is still one for the officers to decide, subject to review by the writ of *certiorari*, as in other cases.¹ "But if the real estate should be in another State or country, or if for any other reason its assessed value can not be obtained, then, as the best and nearest substitute for it, the price paid, as the presumed value in the absence of proof or of any other standard, may be taken as the assessable value."² In the above opinion it is the failure to obtain knowledge of the assessed value of the real estate which is the main ground for taking some other standard for assessment. That failure, it was assumed, might arise if the real estate should be situated in some other State or country, but there was no assumption that, as matter of law, no such knowledge could be obtained. The implication is that if it were in fact obtained, then it was the proper amount to be deducted from the value of the stock, because it might be assumed to be the actual value of the real property.³ In another case, that of the Panama Railroad Company, it appeared that the real estate of the corporation

dence upon which the taxing officers of this State can act as to the actual value of such real estate. We think it is some evidence, and enough to allow such officers to deduct the sum assessed as the actual value. If other evidence is given, it is still a question for the assessors to determine the actual value, in which the assessed value may figure conspicuously."

¹ *Ex rel. Fairfield Chemical Co.*,

(1889) 52 Hun, 93; s. c. 6 Ry. & Corp. L. J. 172.

² *Dictum* in *People v. Commissioners*, 95 N. Y. 554.

³ *Ex rel. Fairfield Chemical Co.*, (1889) 52 Hun, 93; s. c. 6 Ry. & Corp. L. J. 172, distinguishing *People v. Commissioners*, 95 N. Y. 554, where the property in question was not situated in a foreign State, and *People v. Commissioners*, 104 N. Y. 240, where there was no assessed

was situated in New Granada, and that it paid an annual sum in gross to that government in lieu of taxes on its real estate, immunities and personal property. In this case there could be no assessed value of the real estate, and therefore there was no such way to establish its actual value, and hence it was held that an inquiry might be made into the price paid for the real estate, which in the absence of other and better evidence might be taken as representing the true value.¹

§ 805. (d) Less the company's debts.—In New York, in determining the value of the capital stock of a corporation for the purposes of taxation, it is held that the indebtedness of the corporation should be deducted from the real value of the stock and the tax should be imposed upon the balance, provided the balance be not less than ten per cent. of the capital, which under the laws of that State is exempt from taxation.² And under the former revenue law of Kentucky, which required certain corporations to pay a tax on their property equivalent to the tax on real estate, corporations, as well as natural persons, were entitled to deduct their indebtedness from the value of property not required to be listed.³

§ 806. Taxation of securities and loans.—The tax on the bonded debt or loans which is imposed in Maryland and Pennsylvania,⁴ is only supplementary to the tax on capital stock, and is not, properly speaking, a tax upon the corporations themselves, since they deduct the amount of the tax from the interest due their creditors. "The debtor is simply the collector of the tax, and his remedy for collection is to defalk it from the interest; this and no more is the legal effect of the statute."⁵ The constitutionality of the Pennsylvania act has

valuation of the property by the foreign State.

¹ *People v. Commissioners*, 104 N. Y. 240.

² *People v. Coleman*, (1888) 1 N. Y. Supl. 666; N. Y. Laws of 1857, ch. 456, § 3.

³ *Commonwealth v. St. Bernard Coal Co.*, (Ky. 1888) 9 S. W. Rep. 700.

⁴ Md. Pub. Gen. Laws, art. 81, §§ 87-88; Pa. Act of June 30, 1885,

Pa. Laws, 139. Cf. Ind. Rev. Stat. (1887) §§ 6357, 6359.

⁵ *Lehigh Valley R. Co. v. Commonwealth*, (1889) 129 Pa. St. 429; s. c. 7 Ry. & Corp. L. J. 13. In *Hunter's Appeal*, (Pa. 1887) 10 Atl. Rep. 429, (not reported) it was held that the Acts of June 7, 1879, of June 10, 1881, and of June 30, 1885, providing that all mortgages and money owing by solvent debtors, owned by any

been attacked upon various grounds; but it is held that the tax upon the bonds and securities issued by corporations is not unconstitutional in requiring the treasurer of the corporation to deduct the tax from the interest payable to the bondholders, on the ground that it is a taking of property without due process of law, since the law itself gives them notice of the tax, and the mode of its collection;¹ that the basis of estimate being made the nominal instead of the actual value of the securities, is not an unjust discrimination and does not violate the federal constitution in withholding from any person the equal protection of the laws;² that the

person or persons whatsoever, should be liable to taxation for State purposes, did not impose a tax on mortgages and other moneys at interest in the hands of corporations, in addition to the tax paid by them upon their capital stock, and invested in mortgages and loans, "persons" not including corporations, and it not being manifest therefrom that the legislature intended to impose double taxes on corporations. Although a corporation is in the hands of a receiver appointed by the United States court, it is the duty of its treasurer, who is also the treasurer of the receiver, to assess the tax of three mills on its bonded indebtedness, as required by Act Pa. June 30, 1885, and the receiver having paid the interest in full without deducting the tax, the company is liable therefor. *Commonwealth v. Philadelphia & R. C. & I. Co.*, (Pa. 1890) 20 Atlan. Rep. 531. Where interest on the bonded indebtedness of a corporation is paid at a rate less than stipulated on the coupons by the guarantor, who takes up and cancels the coupons, and surrenders them to the corporation, and charges it with the amount paid, the interest will be regarded as paid, and the corporation held liable for the tax on the indebtedness provided for by Act Pa.

June 30, 1885, without awaiting a settlement between the guarantor and the corporation. *Commonwealth v. Philadelphia & R. C. & I. Co.*, (Pa. 1890) 20 Atlan. Rep. 580.

¹ *Bell's Gap R. Co. v. Commonwealth*, (1890) 134 U. S. 232; *City of Chester v. Commonwealth*, (1890) 134 U. S. 240.

² *Bell's Gap R. Co. v. Commonwealth*, (1890) 134 U. S. 232; *City of Chester v. Commonwealth*, (1890) 134 U. S. 240; *Commonwealth v. Delaware Div. Canal Co.*, (1889) 123 Pa. St. 594, holding that the legislature has power to fix the face value of corporate obligations as their value for taxing purposes; that the tax was in the nature of a specific tax, not a tax upon actual value; that the legislature having fixed the nominal value of the bonds as the basis of taxation, no further assessment, properly so called, was required; that it was a proper exercise of legislative power to require the company's treasurer to "assess" the tax—that is to say, to determine the amount of the company's loans liable to taxation at their nominal value, and to apply thereto the rate fixed by law; the taxation being the result of the rule thus applied; *Lehigh Valley R. Co. v. Commonwealth*, (1889) 129 Pa. St. 429; s. c.

law does not impair the obligation of the contract between the company and its creditors;¹ and again, that this mode of taxation is not open to the objection that the corporation is taxed for property not its own, since the tax is in fact on the

7 Ry. & Corp. L. J. 13, where the court having cited the foregoing case with approval, continued: "Taxes have been levied and collected in Pennsylvania in this form for more than half a century. The fourth section of the Act of 1885 is but a transcript of the forty-second section of the Act of 1844, which provides the only method, since its passage, for the assessment and collection of taxes upon municipal loans. The Act of 1844 is still in force, and its validity, until the very recent case of *Commonwealth v. City of Chester*, 122 Pa. St. 626, has never been disputed. On the trial of the cases involving the construction and validity of other statutes differing from that of 1844, this provision of the last-mentioned act has been uniformly and consistently recognized as a valid exercise of legislative power. (*Maltby v. Railroad Co.*, 52 Pa. St. 140.). Specific taxes for a long series of years have been imposed within this State, not only upon particular classes of property, but upon classes of persons, and we have never known the power, when properly exercised, to have been called in question. Taxes are generally classified as specific, *ad valorem*, and for public benefit. The last two classes are necessarily based upon an assessment of actual values, whereas in the first class the value is either fixed by statute, or the tax is intended to subserve some supposed public interest or policy. 'Of the different taxes which the State may impose,' says Mr. Justice Field in *Hagar v. Reclamation Dist.*, 111 U. S. 709, 'there is a vast number

of which, from their nature, no notice can be given to the tax-payer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes, (not dependent upon the extent of his business,) and generally specific taxes on things, or persons, or occupations. In such cases the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold, and he be thus deprived of his property. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is therefore invaded.' Though differing from the ordinary forms pursued in courts of justice, the general system of procedure for the levy and collection of taxes, if not arbitrary, oppressive and unjust, has always been regarded as due process of law. *Kelly v. Pittsburgh*, 104 U. S. 78; *Davidson v. New Orleans*, 96 U. S. 97."

¹ *Lehigh Valley R. Co. v. Commonwealth*, (1889) 129 Pa. St. 429; s. c. 7 Ry. & Corp. L. J. 13, where the court said: "It is difficult to see how the imposition of a tax upon money at interest can be supposed to impair the obligations of the contract which secures payment; the tax is upon the debt. The debtor is simply the collector of the tax, and his remedy for collection is to default it from the interest; this, and no more, is the legal effect of the statute. The whole question turns

bondholder, and not on the corporation.¹ The Ohio statute entitled "An act to enable railroad companies to redeem their bonded debts," which authorizes the issue of certificates of preferred stock, does not authorize the issue of certificates of indebtedness; and hence holders of certificates issued by virtue of the provisions of the act are stockholders in, and not creditors of, the corporation; and are not required to list their shares for taxation in that State.² Bonds issued by a railway company are not "public stocks and securities" within the meaning of the tax acts of Massachusetts,³ but are "debts due;" and money invested in them is "money at interest," for which the owner is entitled to the rights secured by those statutes, even though the company was created by and is to some extent subject to the control of the United States government.⁴

§ 807. Taxation of business, earnings or dividends —

(a) **In general.**— The fourth method of taxing corporations is based upon either the business transacted, or their gross earnings, or net earnings, or dividends. The tax upon the business transacted is imposed in several States upon savings banks, their deposits being reckoned as showing the amount of business;⁵ on insurance companies in Connecticut and Massachusetts, the amount insured being taken as representing the amount of business in the former two States; on foreign life insurance companies in New York, the criterion being the amount of their premiums;⁶ on telephone companies in Con-

upon the validity of the tax; for, if the tax is valid, the creditor certainly can not complain of the remedy provided for its collection. The contract is in no sense impaired; the debtor is held for the payment of the whole debt, but upon the exact footing of his contract. He is simply permitted to defalk such part thereof as he has under legal obligation paid, laid out, and expended on behalf of the creditor."

¹ *Bell's Gap R. Co. v. Commonwealth*, (1890) 134 U. S. 232.

² *Miller v. Ratterman*, (Ohio, 1890)

24 N. E. Rep. 496, construing Ohio Act of April 16, 1870, and Ohio Rev. Stat. § 2746.

³ Mass. Pub. Stats. ch. 11, § 4; Stat. of 1820, ch. 64, § 1.

⁴ *Hale v. Hampshire County Commissioners*, (1886) 37 Mass. 111.

⁵ Me. Rev. Stat. tit. 1, §§ 64-67; N. H. Gen. Laws, ch. 65, § 8; Vt. Rev. Laws, § 3595; Mass. Pub. Stat. ch. 13, §§ 20-24; R. I. Pub. Stat. ch. 27, § 3; Conn. Gen. Stat. § 3918; Md. Pub. Gen. Laws, art. 81, § 86.

⁶ N. Y. Laws of 1887, ch. 699. *Vide infra*, § 808.

necticut, according to the number of telephones and mileage of wire;¹ and in Georgia upon the number of telephone stations.² In Mississippi the number of subscribers is the criterion of the business done by telephone companies.³ Sleeping-car companies are taxed upon the number and mileage of their cars in Georgia and Iowa;⁴ railway companies in Delaware, according to the number of locomotives and passengers;⁵ in Missouri according to mileage;⁶ express companies in Tennessee, according to mileage and number of packages;⁷ mining, smelting and refining companies in Michigan upon tonnage of product.⁸

¹ *E. g.* Conn. Laws of 1889, ch. 178.

² Ga. Laws of 1888, ch. 123, § 7, subd. 2.

³ Miss. Laws of 1880, p. 17.

⁴ Ga. Laws of 1888, ch. 123, § 8, subd. 3; Iowa Rev. Stat. §§ 2023-2025. See also *infra*, § 821.

⁵ Del. Code, 874, p. 29.

⁶ Under Rev. Stat. Mo. 1879, §§ 6871, 6873, which make it the duty of the State board of equalization, after assessing a railroad in its entire length, to apportion the aggregate value to each county according to the ratio which the number of miles in each county bears to the whole number of miles in the State, an assessment of a railroad by a county court for State, county, township and school taxes, need not describe the property other than as so many miles of road of a given value; and a petition, in a suit to recover these delinquent taxes, which sets forth the number of miles of road owned by the defendant in a designated county, is sufficient, as it need not be more specific than the assessment, although the form for a petition prescribed by § 6889 contemplates a description of the road. *State v. Hannibal & St. J. R. Co.*, (Mo. 1890) 13 S. W. Rep. 505.

⁷ The legislature of Tennessee, by an act approved March 29, 1887, provided that the following taxes should be paid by express companies: "In lieu of all other taxes, except *ad valorem* tax, if the lines are less than one hundred miles long, per annum, \$1,000. If the lines are over one hundred miles long, per annum, \$3,000." The same authority, by an act approved April 8, 1889, provided that express companies should pay a tax "in lieu of all other taxes except *ad valorem* tax, if the lines are less than one hundred miles long, for one or more packages taken up at one point in this State and transported to another point in this State, per annum, \$1,000. If the lines are more than one hundred miles long, for one or more packages taken up at one point in this State and transported to another point in this State, per annum, \$3,000." By this act it is made a misdemeanor, punishable by a fine and imprisonment, to conduct the express business without prepayment of the tax.

⁸ Mich. Gen. Stat. §§ 1187, 1226, 1229; "Taxation of Corporations," by Prof. E. R. A. Seligman, (1890) 5 Polit. Science Quart. 269, 307.

§ 808. (b) **Gross receipts.**—The tax upon gross receipts or earnings is imposed by many States on insurance companies, the gross amount of their premiums being regarded as their earnings.¹ But if a statute taxing the gross receipts of foreign insurance companies, provides no method of ascertaining the amount of the gross receipts, they can not be taxed.² The taxation of gross receipts is the method applied to transportation companies in many instances.³ Telegraph companies are taxed on their gross receipts in many States.⁴ Electric-light companies in Georgia,⁵ and gas companies in Massachusetts, are similarly taxed.⁶

§ 809. (c) **Net earnings.**—The net earnings of railway companies are taxed in Georgia, Virginia and Delaware;⁷ of insurance companies, in Alabama, Illinois, Maine, Missouri, Nevada and Indiana;⁸ of savings banks without capital stock,

¹ *E. g.* Ala. Civ. Code, § 454. The New Act of 1886, ch. 679, entitled "An act to provide for the taxation of fire and marine insurance companies," providing that all insurance companies doing business in the State shall pay a certain tax on the amount of their premiums; that their real estate shall continue to be assessed and taxed for State, city, town, county, village, school, or other local purposes, but their personal property, franchise, and business shall be exempt from all assessment or taxation, "except as in this act prescribed," provided that the fire department shall not be affected, and this is held to apply as well to local as to State taxation and assessment. *People v. Coleman*, (1890) 121 N. Y. 542.

² *British Foreign Marine Ins. Co. v. Assessors*, (1890) 42 Fed. Rep. 90, construing La. Acts of 1886, ch. 76.

³ *E. g.* Express companies in Georgia: Ga. Laws of 1887, pp. 22, 24. Sleeping-car companies in Alabama: Ala. Civ. Code, § 454. Express com-

panies in Arkansas are taxed on gross receipts, less amount paid for transportation to domestic railways. Ark. Rev. Stat. § 5640. In Maine, where horse railways are taxed on gross receipts according to a graduated scale of one-tenth of one per cent. for every thousand dollars. Me. Rev. Stat. tit. 1, § 47. For other examples, *vide infra*, §§ 815 and 821.

⁴ Ark. Rev. Stat. § 5640; Ala. Civ. Code, § 454; Ga. Laws of 1887, pp. 22, 24, and cases cited *infra*, § 823.

⁵ Ga. Laws of 1887, pp. 22, 24.

⁶ Mass. Acts of 1882, ch. 106, § 4; Mass. Acts of 1885, ch. 314.

⁷ Ga. Code, § 818. And fifty cents on every hundred dollars in value of property in Virginia. Va. Acts of 1874, p. 353. In Delaware railway and canal companies. Del. Code, p. 41.

⁸ Ala. Act of Dec. 11, 1886, § 3; Ill. Rev. Stat. ch. 73, § 30, foreign companies only; Me. Rev. Stat. tit. 1, § 59, foreign companies only; Mo. Rev. Stat. § 6057, foreign companies only; Neb. Comp. Stat. ch. 77, § 38;

in Pennsylvania;¹ and of gas-works, water-works, electric-light companies, ferries, toll-bridges, public mills and gins and cotton compresses, in Alabama.² And in England the Customs and Inland Revenue Act of 1855 imposes a duty on the property of bodies corporate and unincorporate. This is a duty of five per cent. upon the annual value, income or profits of the real or personal property of these bodies, after deducting all necessary outgoings, costs, charges and expenses properly incurred in the management of their property.³

§ 810. (d) **Dividends.**—In Alabama the general corporation tax is upon dividends declared or earned, and not divided; and upon the capital stock.⁴ Gas and electric-light companies are taxed upon their dividends in New Jersey, and turnpike, street-railways and gas companies in Kentucky.⁵ In New York and Pennsylvania the tax, while upon the capital stock, depends upon the contingency of the company being a dividend-paying concern.⁶

§ 811. **Tenure of property as affecting liability for taxes.** Generally speaking, a company does not have such an ownership in property leased by it as to be liable for taxes imposed thereon.⁷ Thus the Missouri statute,⁸ declaring all other property "owned" by any railway company to be subject to taxa-

Ind. Rev. Stat. § 6351, home companies only.

¹ Pa. Act of June 1, 1889, §§ 25, 27.

² "Taxation of Corporations," by Prof. E. R. A. Seligman, (1890) 5 Polit. Science Quart. 269, 296, citing Ala. Code, § 454, subd. 5.

³ Customs and Inland Rev. Act of 1855, § 11.

⁴ Ala. Civ. Code, § 453.

⁵ Ky. Rev. Stat. ch. 90, art. 4, §§ 1 and 3.

⁶ *Vide supra*, § 802. Under the Pennsylvania act of June 30, 1885, which repeals all laws laying taxes upon certain manufacturing corporations, "reserving and excepting unto the Commonwealth the right to collect any taxes accrued under the

laws repealed," it has been held that a corporation which was chartered February 18, 1885, and declared dividends during the year amounting to twelve per cent., viz., one of six per cent., May 12th, and another of like amount, August 6th, was subject to taxation upon its capital stock, measured by the amount of its dividends, for the proportion of the tax year from February 18th, when it was incorporated, to June 30th, the date of the repeal. *MacKellar & Co. v. Commonwealth*, (Pa. 1887) 10 Atlan. Rep. 780, not reported.

⁷ *State v. St. Louis County*, (1886) 84 Mo. 234.

⁸ Mo. Act of March 10, 1871.

tion, does not apply to Pullman cars operated by a company under a lease.¹ A railroad company which has acquired from a city the right to perpetual possession of certain land, and is in the actual occupancy thereof, is liable for the taxes thereon, although it does not own the title to the fee.² Where in a grant of land to a railway company, there is a provision that a conveyance of the land to the company shall not be executed, until payment be made to the federal government for the cost of surveying, selecting, and conveying it, no taxes can be levied upon it by any State until that payment has been made.³

§ 812. Taxation of banks — (a) Who are bankers.— One whose business is buying and selling stocks for his customers, and who employs capital in his business, and has a regular place for transacting it, is a “banker,” within the meaning of the federal statute which provides that every person having a place of business where money is advanced or lent on stock, bonds, *etc.*, or where stocks, bonds, *etc.*, are received for discount or for sale, shall be regarded as a banker.⁴ But it has

¹ *State v. St. Louis County Court*, (1886) 13 Mo. App. 53.

² *City of Muscatine v. Chicago, R. I. & P. Ry. Co.*, (Iowa, 1890) 44 N. W. Rep. 909.

³ *Northern Pacific R. Co. v. Traill County*, (1896) 115 U. S. 600.

⁴ *Richmond v. Blake*, (1890) 132 U. S. 592; *s. c.* 7 Ry. & Corp. L. J. 194, construing U. S. Rev. Stat. §§ 3407 and 3408, and saying: “This language embraces the present case. The plaintiff was not a broker who, without employing capital of his own, simply negotiated purchases and sales of stocks for others, receiving only the usual commissions for services of that character. In his business of buying and selling stocks for others, he regularly employed capital, by the use of which interest was earned upon moneys advanced by him for his customers substantially as it would be earned by a

bank upon money loaned to its customers. In the parlance of the stock exchange he might be called a ‘stock-broker;’ yet here were all the conditions which under the statute made the case of a banker whose capital employed in his business was liable to a tax of one twenty-fourth of one per centum each month.” *Field and Miller, JJ.*, dissenting. In *Warren v. Shook*, 91 U. S. 704, the question was whether a firm, holding a special license as bankers, was liable to the tax imposed by U. S. Act of June 30, 1864, § 99. That statute imposed a tax of one-twentieth of one per centum upon the par value of stock and bonds sold by “brokers and bankers doing business as brokers.” It was held that congress intended to impose the duty prescribed by section 99 upon bankers doing business as brokers, although a person, firm or company,

been decided that corporations whose business is to invest their own capital, and not that of others, in bonds secured by mortgage upon real estate, and to negotiate, sell, and guaranty those bonds, are not banks or bankers, within the meaning of this act; and that congress did not intend that a person or corporation selling its own property, not that received from other owners for sale, should be classed as a banker or bank for the purposes of taxation.¹

§ 813. (b) National banks.—By the federal statute it is provided that shares of national bank stock may be taxed as

having a license as a banker, might be exempted by subdivision 9 of section 79 of the Act of 1864, as amended by the Act of March 3, 1865, from paying the special tax imposed upon brokers. See generally on taxation of banks: *Taxation of State Banks*, (Boston, 1865) by W. B. Stevens; "Bank Taxation," by Samuel T. Spear, 21 Alb. L. J. 427; "Report of the Committee of Bank Officers of the City of New York in relation to Bank Taxation," New York, 1875; "Reports of the American Bankers' Association upon Bank Taxation," New York, 1875-1889; "Taxation of Bank Stock," (Albany, 1822) being a speech by S. M. Hopkins; "Taxation of Banks by the State of New York," (New York, 1880) Thomas J. Hallhouse.

¹Selden v. Trust Co., 94 U. S. 419. The court in this case referred to U. S. Rev. Stat. § 3407 as describing three distinct classes of artificial and natural persons, distinguished by the nature of their business: *First*, those who have a place of business where credits are opened by the deposit or collection of money or currency subject to be paid or remitted upon draft, check, or order; *second*, those having a place of business where money is advanced or lent on stocks, bonds, bullion, bills of exchange, or prom-

issory notes; *third*, those having a place of business where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or for sale. In respect to the third class it was said: "The language of the statute is, 'where' such property is 'received' 'for discount or for sale.' The use of the word 'received' is significant. In no proper sense can it be understood that one receives his own stocks and bonds or bills or notes for discount or for sale. He receives the bonds, bills or notes belonging to him as evidences of debt, though he may sell them afterwards. Nobody would understand that to be banking business. But when a corporation or natural person receives from another person, for discount, bills of exchange or promissory notes belonging to that other, he is acting as a banker; and when a customer brings bonds, bullion, or stocks for sale, and they are received for the purpose for which they are brought, that is, to be sold, the case is presented which we think was contemplated by the statute. In common understanding, he who receives goods for sale is one who receives them as agent for a principal, who is the owner. He is not one who buys and sells on his own account."

part of the personalty of the owner, and that each State may tax them in its own manner, except that the taxation shall not be at a greater rate than is imposed on other "moneyed capital" owned by citizens of the State, and that the shares of non-residents shall only be taxed in the city wherein the bank is located.¹ A considerable number of cases involving the construction of this section of the United States Revised Statutes have gone to the Supreme Court, in which the complaint has been of discrimination against national banks and their shareholders, in favor of owners of other moneyed capital, in the assessment of taxes by the States. In most of them the court has upheld the tax, in others it has pronounced against it. From the nature of the subject, each case has presented its own special facts, and has differed in these facts from every other case. The Supreme Court has dealt fairly with the tax laws of the States which have been brought under its review. It has held that the shares of national banks may be taxed by the States, although no provision be made in assessing it for deducting from computation the always large amount of United States bonds held by the banks.² It is held both by the supreme and circuit courts that the tax upon the shares of these banks may be assessed upon and collected from the banks themselves.³ The Supreme Court

¹ U. S. Rev. Stat. § 5219. See generally on taxation of national banks: "National Banks & State Taxation," (New York, 1887) by Chauncey P. Williams; "Taxation of National Banks," monographic note by Robert Desty, 13 Fed. Rep. 433; "Power of States to Tax Property of National Banks," monographic note, 96 Am. Dec. 290, 297; "Taxation of National Bank Shares by or under State Authorities," by John W. Daniel, 5 Va. L. J. 535; "Taxation of Shares in National Banks," monographic note by John F. Dillon, 6 Am. L. Reg. N. S. 475; "The Question of Taxation — State & National Banks," (Albany, 1864); "Taxation of National Bank Shares," by Isaac F. Redfield, 5 Am. L. Reg. N. S.

526; 6 Am. L. Reg. 475; 8 Am. L. Reg. 272; "State Taxation of National Corporations," by Russell H. Curtis, (1885) 21 Cent. L. J. 428.

² Hughes, J. in *First Nat. Bank v. City of Richmond*, (1889) 39 Fed. Rep. 309; s. c. 6 Ry. & Corp. L. J. 331; s. c. (1890) 42 Fed. Rep. 877.

³ La. Act of 1888, § 27, providing that shares in banks shall be assessed to the shareholders, but requiring the bank to pay taxes so assessed, and authorizing it to collect them from the shareholders, imposes a tax, not upon the bank, but upon its shares, as permitted by act of congress, providing that a State may determine the manner of taxing the shares of national banks located in the State. *Whitney Nat.*

has held that neither of these circumstances in itself vitiates a tax. Even in cases where it has appeared that the system of taxation enforced by a State has operated unequally as between shareholders of national banks and owners of other moneyed capital, the court has not looked upon the system with unfriendly scrutiny and illiberal spirit, but in cases where the discrimination was trivial or technical, or such as must always result from the greater or less imperfection of all human legislation, it has declined to interpose in behalf of the taxpayer. Further than thus indicated, there does not appear in the many decisions in which that court has given construction to the prohibition in the federal statute, to be any general principle laid down applicable to all cases that have arisen. The court has decided each case upon its own special facts. The question has continually been, does the tax materially and injuriously discriminate against the shareholders of national banks? And in every case the question has been rather one of fact than of law.¹ In deciding that shareholders of national banks may be taxed at a rate in fixing which no account has been taken of the non-taxable United States bonds required by law to be held by those banks, the court has not made so absolute a ruling that if it should be shown in any particular case that such an omission operates as a material and injurious discrimination against national bank shareholders, in favor of other moneyed capitalists, the tax thus operating may not be pronounced illegal. The paramount question in every case is, whether or not the tax, or system of taxation, complained of, materially and injuriously discriminates against national bank shareholders, in favor of other moneyed capitalists, in a degree tending to discourage investments in the shares of the national banks. Upon this question of fact, the decisions of the Supreme Court have turned, and all decisions on this subject must turn.² But it is doubtful whether congress, in authorizing the States to tax the shares of national banks, under legislation of their own,

Bank v. Parker, (1890) 41 Fed. Rep. 402, and cases there cited.

¹ *Hughes, J., in First Nat. Bank v. City of Richmond*, (1889) 39 Fed. Rep. 309.

² *Hughes, J., in First Nat. Bank v. City of Richmond*, (1889) 39 Fed. Rep. 309.

prescribing the manner and place of doing so, intended thereby to authorize cities, counties, and towns to exercise the same power. The mere fact that municipal corporations may tax national banks at their pleasure would tend strongly to discourage investments in their shares, and no instance of such a tax has yet gone to the Supreme Court of the United States.¹ Congress requires the tax to be assessed as part of the personal property of the owners of the shares of the bank. It does not authorize the taxation of the stock of a bank *in solido* by the city in which it does business; but only the shares of individual owners residing in the city are taxable, and they must be taxed separately, in order that the owner may deduct from their value the amount of his personal indebtedness, where the State laws or municipal ordinances permit such deductions, and require equality of taxation.² By an act of her legislature in 1890, Virginia attempted to legalize the

¹ Hughes, J., in *First Nat. Bank v. City of Richmond*, (1889) 39 Fed. Rep. 309.

² *First Nat. Bank v. City of Richmond*, (1889) 39 Fed. Rep. 309, where Hughes, J., continued: "To assess the tax as if against the bank *in solido*, on a value made up of the whole amount of the bank's capital and surplus fund, without deduction for non-taxable securities, constituting nearly half the bank's capital; to require this tax to fall upon the whole body of the bank's shareholders, wherever resident, whether in Richmond or Virginia, and to give no shareholder the privilege of deducting the amount of his debts from that of securities due him in determining the net value of his estate — these features of the tax complained of by the bill under consideration all seem to me to condemn it as contrary alike to national, State, and municipal law, and as discriminating against the owners of national bank shares in favor of other moneyed capitalists, in a manner obnoxious to the policy of congress in

regard to the national banks, and seriously discouraging to investments in national bank shares. I will sign a decree of perpetual injunction, this ruling being founded on the decisions of the Supreme Court of the United States in the cases of *Hills v. Bank*, 105 U. S. 319, and *Whitbeck v. Bank*, 127 U. S. 193. In dealing with the subject I have also considered the decisions of the same court in *Van Allen v. Assessors*, 3 Wall. 573; *People v. Commissioners*, 4 Wall. 244; *Bank v. Commissioners*, 9 Wall. 353; *Bank v. New York*, 121 U. S. 138; *Lionberger v. Rouse*, 9 Wall. 475; *Waite v. Dowley*, 94 U. S. 533; *Supervisors v. Stanley*, 105 U. S. 311; *Bank v. Kimball*, 103 U. S. 733; *Pelton v. Bank*, 101 U. S. 143; *Cummings v. Bank*, 101 U. S. 153; *Bank v. Davenport*, 123 U. S. 83, and *People v. Weaver*, 100 U. S. 539. The jurisdiction of this court, as a court of chancery, to entertain this bill, I have thought too plain to need discussion."

taxes levied upon the assessments declared invalid in the case above cited; but the act has been declared void.¹

§ 814. (c) **Savings banks.**—The reserved profits of a savings bank, whose charter empowers the directors by majority vote to “divide the whole property among the depositors in proportion to their respective interests therein,” belong to the depositors, and can not be taxed as the property of the bank.² Under the Michigan tax law, providing that, except as to real estate, all taxation of State banks shall be against the shareholders, a savings bank is not liable to taxation, as a corporation, upon its bank fixtures and surplus of property beyond its nominal capital stock, where its shareholders have been taxed upon their shares.³ Under the Massachusetts act providing for a tax upon savings banks of a percentage to be paid semi-annually, on the average amount of deposits for the six months preceding, the tax is to be computed on the amount deposited, together with the interest and dividend accruing and payable to depositors, and does not include the guaranty fund of the bank, nor the undivided profits.⁴

§ 815. **Railway and transportation companies.**—The tax upon railways is usually either upon their property or upon their gross receipts. In Alabama it is a property tax.⁵ So, the local taxation in New York is upon the railway property.⁶ In California it is upon the franchise and property, the assessment being made by the State and apportioned among the municipalities for taxation by them.⁷ So in Colorado the tax is upon the property, the realty being taxed where it lies and

¹ *National Bank v. City of Richmond*, (1890) 42 Fed. Rep. 877, construing Va. Act of Jan. 27, 1890.

² *Mechanics' Sav. Bank v. Granger*, (R. I. 1890) 20 Atlan. Rep. 202; “Objections to the Taxation of Savings Banks,” (New York, 1880) by W. G. Abbott.

³ *Lenawee Co. Sav. Bank v. City of Adrian*, (1887) 66 Mich. 273.

⁴ *Suffolk Sav. Bank v. Commonwealth*, (1889) 151 Mass. 103, construing Mass. Pub. Stat. ch. 13, § 20.

⁵ Ala. Civ. Code, § 453, subd. 11.

⁶ *Taxation of the Elevated Railroads in the City of New York*, (New York, 1883) by Roger Foster. Whether a railway is constructed upon or beneath the surface, or on pillars, is immaterial, as regards its liability to taxation, the law regarding as land the structures adapted to support it, or to facilitate and protect its use. *People v. New York Tax Commissioners*, (1886) 101 N. Y. 322.

⁷ Cal. Const. art. xiii, § 10.

the other property assessed by the State and notice given to the municipalities of its value.¹ So again in Kansas, railway property is taxed, the assessment being made by the State and apportioned as in California.² In Iowa, while the assessment is of the property, the gross earnings per mile are taken into consideration in fixing its value. This is done by the State and, as above, the municipal corporations tax. Railway and transportation companies are in many States taxed upon their gross receipts;³ or, in the case of interstate roads, upon such part of the gross receipts as their mileage within the State is to the mileage of the whole line.⁴ A tax on the undivided profits of a railway "which have accrued, been earned and added to any surplus, contingent, or other fund" during the year, is not to be assessed upon undivided profits used for new construction.⁵ In Minnesota the State was declared to be deprived of the right to assess in specie the land of a railway company, by a statute requiring the company to pay into the State treasury on or before a certain day in each year three per cent. of its gross earnings, and declaring that sum to be in lieu of all taxes and assessments.⁶ But a statute which provides that a company shall at all times, and as fixed by statute for similar reports from other railway companies, make a report of its gross earnings for the preceding year, and shall each year pay into the State treasury, at the times fixed by the revised statutes for payment by railway companies of their license fees, a sum equal to five per cent. of its gross earnings for the preceding year, which should be in lieu of all other license fees exacted from the company, merely prescribes a way for ascertaining the amount of the license fee for the year in which it is to be paid, and does not impose a tax on the

¹ Colo. Gen. Stat. § 2847.

² Kan. Comp. L. p. 95.

³ *E. g.* Me. Rev. Stat. p. 136, and cases cited *infra*. But in Virginia and Delaware the tax is on the net earnings of railways. "Taxation of Railroads & Railroad Securities," (New York, 1880) being a report by C. F. Adams, W. B. Williams and J. H. Oberly, a committee appointed

at a convention of State Railroad Commissioners.

⁴ *Vide infra*, § 821.

⁵ *Marquette, H. & O. R. Co. v. United States*, (1888) 132 U. S. 722, construing Act Cong. July 14, 1870.

⁶ *Hennepin County v. St. Paul M. Ry. Co.*, (1886) 33 Minn. 534, construing Minn. Special Laws of 1857, ch. 1, § 18.

gross earnings of the road.¹ The Maryland code provides that "Whenever the road of any railroad company, organized under the laws of this State, shall extend beyond the limits of this State, into any other State or States, and the return of the treasurer or other financial officer of said company, made to the comptroller, shall not show certainly and accurately the precise amount of gross receipts within this State, the comptroller may ascertain said amount by making the gross receipts in this State bear the same proportion to the whole gross receipts of said company as the number of miles of said road in this State does to the whole number of miles in the length of said road."² This method of ascertaining the gross receipts within the State is declared to be fair and reasonable. It is true the gross receipts on one part of the road may be greater than on another, but perfect equality in the assessment and apportionment of taxes is unattainable, and hence this rule is adopted.³ In a late case in Maryland it is held that where a portion of a line of a street railway company, which is required to pay to the city in which it is located a certain percentage of the gross receipts from passenger travel within the city limits, runs beyond the city limits, and the company keeps no separate account of the receipts from this portion of the road, it is proper, in arriving at the amount of its receipts, to take the amount which bears the same proportion to the receipts of the whole line as the number of miles of road beyond the city limits bears to the total number of miles operated.⁴ Under the provision of the Wisconsin statute, requiring railway companies annually to make and return a "statement of the gross earnings of their respective roads for the preceding calendar

¹ *State v. Harshaw*, (Wis. 1890) 45 N. W. Rep. 308.

² Md. Code, II, art. 81, § 153, p. 1264.

³ *Delaware Railroad Tax Case*, 18 Wall. 208, 231, where this rule was approved by the Supreme Court of the United States. It was also approved in *State Railroad Tax Cases*, 92 U. S. 608-611, and *Western Union Telegraph Co.'s Case*, 125 U. S. 530-552; and in *State v. Railroad Co.*, 45 Md. 384.

⁴ *Baltimore Union Passenger Ry. Co. v. City of Baltimore*, (Md. 1890) 18 Atl. Rep. 917; s. c. 7 Ry. & Corp. L. J. 202; holding also that the testimony of passengers who had been riding on the line beyond the city limits several times a day, stating from casual observation their estimate of the number of passengers who rode on that portion of the line, is incompetent to show the amount of the receipts.

year, of the number of miles operated, and the gross earnings per mile, per annum, during such year," requiring also the payment of a license fee, and dividing railways into classes with respect to the gross earnings "per mile per annum of operated road," it was held immaterial, in determining the class to which a road belongs, that it was operated for only a short while during the year.¹ And under this act it is also held that spur tracks are to be included in the mileage; that payments for rent of a leased road must not be deducted from the gross earnings, and that the excess of the amount received for the use of cars over the amount expended for that purpose, is to be accounted as a part of the gross earnings.² An assessment of taxes due the State on the gross receipts of a railway company should properly be made in the name of the company alone, even though it has passed into the hands of a receiver appointed by a United States court.³ In New York there is a statute providing that all taxes, except for schools and roads, assessed upon any railroad in a town which has issued bonds in aid thereof, shall be held as a sinking fund for the redemption of the municipal bonds.⁴ Where a town has collected from a railroad company money to pay the interest on bonds issued in its aid, and it appears that the bonds were void, the railroad will be entitled to recover the money, and no limitation will bar it of that right.⁵ So far as railway and transportation companies do business entirely within the limits of a single State, questions arising under its tax laws are to be determined by the construction put upon them by the courts of the State.⁶

¹ *State v. McFetridge*, (1886) 64 Wis. 130, construing Wis. Rev. Stat. §§ 1211 *et seq.*

² *State v. McFetridge*, (1886) 64 Wis. 130.

³ *Philadelphia & Reading R. Co. v. Commonwealth*, (1886) 104 Pa. St. 80.

⁴ N. Y. Laws of 1869, ch. 907, § 4, as amended by N. Y. Laws of 1871, ch. 283. And this statute is held to apply not only to railways constructed under the act of 1869, but to all towns bonded in aid of railroads constructed in or through them.

Clark v. Sheldon, (1887) 106 N. Y. 109, holding also that it is the duty of the county treasurer under this act to set aside and invest all such taxes paid him by the railways, although by doing so he will not have money enough to pay the obligations of the county to the State and to the county officials and other county creditors. *Beach on Railways*, § 227.

⁵ *Aurora v. Chicago & C. R. Co.* 19 Ill. App. 360; *Beach on Railways*, § 227.

⁶ *United States Ex. Co. v. Allen*,

§ 816. **Bridge companies.**— Railway bridges are frequently constructed and owned by companies distinct from those owning and operating the railways which cross them. And where this is the case, the bridge is not to be taxed as part of the property of the railway company,¹ even though the stockholders of both companies are the same, and all of the bridge company stock is pledged to the railway company, which by contract has the permanent use of the bridge.² The liability for taxation is upon the bridge company itself. From this it follows that these structures are subject to local taxation, where if owned by the railway company they might be exempt. And the return of the bridge to the railroad assessors of the State as a part of the road's mileage does not exempt it from taxation as an independent structure.³ The Iowa Code makes railway bridges across the Mississippi river taxable as real estate.⁴ In a recent Kentucky case, a city

(1889) 39 Fed. Rep. 712. Mass. Acts of 1884, ch. 157, § 2, authorizes a railroad to take so much land in a certain region "as it may deem necessary or suitable for station purposes, and for tracks and yard-room to be used in connection therewith;" section 5 provides that the company, in the exercise of the powers granted, is to be subject to all the duties, liabilities, and restrictions which are provided by the general laws in like cases; and Mass. Pub. Stat. ch. 112, § 92, provides that "land without the limits of the route, fixed as aforesaid, and taken or purchased for depot or station purposes, shall not be exempt from taxation." Under these provisions it was held that land taken for station purposes is liable to taxation, although the limits of the road have not been fixed as provided; that it would be assumed that the whole of the taking is for station purposes, as the tracks and yard-room are merely incidental; and that although part of the taking was once within the limits, yet if it has been sold, and the whole of the taking is for station purposes,

that part will not be exempt. *Norwich & W. R. Co. v. County Commissioners*, (Mass. 1890) 23 N. E. Rep. 721.

¹ *St. Louis & S. F. Ry. Co. v. Williams*, (Ark. 1890) 13 S. W. Rep. 796.

² *St. Louis & S. F. Ry. Co. v. Williams*, (Ark. 1890) 13 S. W. Rep. 796, distinguishing *State v. Depot Co.*, (1889) 42 Minn. 142.

³ *St. Joseph & G. I. R. Co. v. Devereux*, (1890) 41 Fed. Rep. 14.

⁴ Accordingly, the assessment of a tax against a bridge company, owning a bridge across the Mississippi river from Iowa to Illinois, by the county auditor, (after the assessment lists for that year have passed from the assessor,) under Code Iowa, § 841, giving the county auditor power to correct the assessment or tax books, where the assessment is made as on personal property, when the only property owned by the company is part of its bridge and the approach thereto, is void, since Code Iowa, § 808, makes railroad bridges across the Mississippi river taxable as realty. *Keithsburg Bridge Co. v. McKay*, (1890) 42 Fed. Rep. 427.

whose corporate limits extend to low-water mark on the opposite side of the Ohio river, is held to have authority to make an assessment for railroad and school taxes of the district, against a railroad bridge built across the river, where the city granted the land on which the approaches of the bridge are built, reserving as a consideration therefor the right to tax the bridge itself, and all its appurtenances within the corporate limits of the city.¹

§ 817. Foreign corporations — (a) The power to tax.—

When a foreign corporation goes into a State and engages in business there, undoubtedly it does so subject to the general policy and the course of legislation in the State.² It can exercise its franchises there only so far as it may be permitted by the local sovereign. The right rests wholly upon the comity of States.³ A corporation of one State can not do business in another without the latter's consent, express or implied; and the consent may be accompanied with such conditions as the latter may think proper to impose.⁴ These conditions will be valid and effectual, provided they are not repugnant to the constitution or laws of the United States, inconsistent with the jurisdictional authority of the State, or in conflict with the rule which forbids condemnation without opportunity for defense.⁵ A foreign corporation can not invoke the provision of

¹Henderson Bridge Co. v. City of Henderson, (Ky. 1890) 14 S. W. Rep. 85.

²Runyan v. Coster, 14 Pet. 123, cited in New York, L. E. & W. R. Co. v. Commonwealth, (1889) 129 Pa. St. 463; s. c. 7 Ry. & Corp. L. J. 14. See generally: "Argument for a Change in the Law in regard to Taxing Foreign Corporations," (Boston, 1877) by Edward Atkinson; "Taxation of Bonds or Stock of Foreign States, Municipalities and Corporations," 18 Am. L. Reg. N. S. 1; "Taxation of Shares of Stock in Foreign Corporations," monographic note by A. J. Marvin, 19 Am. L. Reg. N. S. 774.

³Paul v. Virginia, 8 Wall. 181. Unless the validity of N. J. Act of

April 18, 1884, for taxing corporations, is successfully assailed on constitutional grounds, a tax imposed under color of it, and not stayed in its collection by pending proceedings in *certiorari*, presents a proper case for the granting of an injunction against the corporation doing business until the tax is paid as provided by the act. Standard Under-Ground Cable Co. v. Attorney-General, (N. J. 1890) 19 Atlan. Rep. 733.

⁴St. Clair v. Cox, 106 U. S. 350.

⁵Insurance Co. v. French, 18 Howard, 404; Doyle v. Insurance Co., 94 U. S. 535; Milling Co. v. Pennsylvania, 125 U. S. 181; New York, L. E. & W. R. Co. v. Commonwealth, (1889) 129 Pa. St. 463; s. c. 7 Ry. & Corp. L. J. 14.

the federal constitution that "citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," against legislation requiring it to pay a license for the privilege of keeping an office within the State, corporations not being citizens within the meaning of that clause.¹ Neither can it invoke the fourteenth amendment providing that "no State shall deny to any person within its jurisdiction the equal protection of its laws," against legislation requiring the payment of a license for the privilege of keeping an office therein.² And a tax upon the franchise of all corporations doing business within the State, can not be evaded by a foreign corporation on the ground that, as applied to foreign corporations, the tax is an unconstitutional interference with interstate commerce.³ A tax upon the gross receipts of foreign companies is void only as to that part of their receipts derived from interstate commerce.⁴ The legislature, in levying a tax upon the gross receipts of the business conducted in the State by a foreign corporation, may require it to be paid by the resident agent, and this liability, on default by him, may be enforced by action.⁵ A company incorporated by an act of congress is not a foreign corporation within the meaning of the Pennsylvania revenue act; and, although it does business in that State, is not, therefore, obliged to take out the license and to pay the tax provided for by the act.⁶ The proviso in that act, that, if a majority of the stock of a foreign corporation doing business in the State be owned or controlled by a corporation of the State, it shall not be obliged to take out a license and pay a privilege tax, is construed as referring to a majority of the stock actually issued by the foreign corporation, and not to a majority of the total amount of stock which it is by the terms of its charter authorized to issue.⁷ Under the statutes regulating taxation in Michigan,⁸

¹ *Pembina Consolidated Silver Min. & Milling Co. v. Pennsylvania*, (1888) 125 U. S. 181.

² *Pembina Consolidated Silver Min. & Milling Co. v. Pennsylvania*, (1888) 125 U. S. 181.

³ *People v. Wemple*, (1890) 117 N. Y. 136, construing N. Y. Laws of 1880, ch. 542, § 3, as amended by Laws of 1881, ch. 361.

⁴ *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411. *Vide infra*, § 823.

⁵ *State v. Sloss*, (1888) 87 Ala. 119.

⁶ *Commonwealth v. Texas & Pacific R. Co.*, 98 Pa. St. 90, construing Pa. Act of June 7, 1879.

⁷ *Commonwealth v. Texas & Pacific R. Co.*, 98 Pa. St. 90.

⁸ Mich. Tax Law of 1892.

taxes can not be imposed on a foreign railway company, made by the consolidation of lines partly within and partly without the State, as though it derived its powers from the laws of the State.¹ A legacy to a foreign college is subject to the New York collateral inheritance tax, providing that all property which shall pass by will from any person who may die seized or possessed thereof, while a resident of that State, to any body, politic or corporate, other than to the societies, corporations, or institutions now exempted by law from taxation, shall be subject to a tax of five dollars on every hundred.²

§ 818. (b) "Doing business" construed.—Under statutes imposing a tax upon foreign corporations doing business within the State, questions have arisen as to wherein doing business consists.³ A pipe line company organized in another State, whose line extends across a part of New Jersey, is held to be within the act imposing a license tax upon all corporations doing business in that State.⁴ A New York railway company which, to avoid certain engineering difficulties, constructed a small portion of its road through Pennsylvania, is held to be subject to taxation there like other companies doing business within the State; and this although it pays a privilege tax

¹ *Chicago & N. Ry. Co. v. Auditor-General*, (1886) 53 Mich. 79.

² *In re McCoskey's Estate*, (1888) 1 N. Y. Supl. 782, construing N. Y. Laws of 1887, ch. 713, § 4. In another case, construing the same act, a testator died, leaving legacies to a church, a missionary society incorporated in New York, and a foreign corporation. In a controversy to determine the rights of the three corporations to take the legacies free from the collateral tax, it was held that, since a church is exempt only as to its buildings, lots, and furniture, under 2 N. Y. Rev. Stat. § 4, and both the church and the missionary society fall outside of the exemptions of subd. 6, of "all stock owned by the State, or by literary or charitable institutions," and subd. 7, of "the personal estate of every incor-

porated company not made liable to taxation on its capital," they are subject to the tax on their bequests; that the foreign corporation, although exempt from taxation by its charter, is not exempted by the statute, and is subject to its provisions. *Catlin v. St. Paul's Church*, (1888) 1 N. Y. Supl. 808.

³ Pa. Act of June 30, 1885, § 4; N. Y. Laws of 1880, ch. 542, § 3; Revision of N. J. Supl. p. 1016, par. 156.

⁴ *State v. Berry*, (N. J. 1890) 19 Atlan. Rep. 665, construing Revision of N. J. Supl. p. 1016, par. 156, and holding further that the company is also subject to be taxed for real estate owned by it in the State in the township where it is located, under the general tax law.

also for the right to construct its road through her territory.¹ It has been held that although an occasional business transaction in New York, maintaining an office where meetings of the directors are held, transfer-books kept, dividends declared and paid, and other business merely incidental to the regular business of a corporation is done, may not bring the corporation within the statute of that State imposing a tax on corporations organized under the laws of other States and doing business in New York; yet that, when all these things are done, and, besides, its president, secretary and treasurer have their offices there, its silver bullion is all sold there, and the proceeds there received, some of the proceeds lent and some used in the State, such a substantial portion of the business is done as brings the corporation within the act.²

§ 819. (c) **Movable property of foreign corporations.**—Movable property of a corporation in use in other States is taxable only in the State of the company's domicile.³ Thus, rolling-stock used by a railway company in operating a leased road in another State is taxable not in the latter State but in the State in which the company is domiciled.⁴ And that portion of the stock of a Pennsylvania corporation represented by dredges, tug-boat, and scows, not permanently located any-

¹ New York, *L. E. & W. R. Co. v. Commonwealth*, (1899) 129 Pa. St. 463; s. c. 7 Ry. & Corp. L. J. 14.

² *People v. Horn Silver Min. Co.*, (1887) 105 N. Y. 76, construing N. Y. Laws of 1880, ch. 542, § 3.

³ Mich. Sess. Laws 1885, No. 153, § 2, provides that shares in certain foreign corporations owned by inhabitants of that State shall be taxed. "Shares in corporations, the property of which is taxable to itself, shall not be assessed to the shareholders." Section 4 enacts that all corporate property, except when otherwise provided, shall be assessed to the corporation as to a natural person, where its principal office in the State is. By subdivision 2 of section 13, each person is required to set forth, as property liable to taxation, "all

shares in foreign corporations, (except national banks,) and their value." Section 2 provides that, for the purpose of taxation, personal property "shall include all goods and chattels within the State; all ships, boats, and vessels belonging to inhabitants of this State;" and that the personal property of a non-resident can not be taxed unless it has an actual *situs* in the State. Plaintiff was taxed on stock in a foreign corporation, whose boats lying in the same State were taxed there. And it was decided that, as the boats were improperly taxed, the stock was taxable against plaintiff. *Graham v. Township of St. Joseph*, (1888) 67 Mich. 652.

⁴ *Baltimore & O. R. Co. v. Allen*, (1886) 22 Fed. Rep. 376.

where, and not registered, but carried from State to State for dredging purposes, is taxable in Pennsylvania, although the boats were built outside the State, and have never been in it.¹

§ 820. (d) **Discriminations.**— A distinction, however, is drawn between sums required to be paid by foreign corporations for the privilege of acting in a corporate capacity within the State, and taxes discriminating against them by reason of their foreign origin.² If there be a condition imposed by the State that corporations shall pay a fixed sum for this privilege before they shall be allowed to do business at all, this is “a condition and not a tax; so, perhaps, if the license were required to be renewed at stated periods.”³ And it has been held that when the corporation is required to pay a percentage upon its receipts, and the payment is required to be secured by a bond before the corporation is allowed to do business in the State, this special requirement distinguishes it from ordinary taxation and stamps its character as a license-fee.⁴ But having paid the license-fee and thus having acquired the privilege of doing business in the State, foreign corporations are entitled to the protection of its laws as fully as citizens thereof.⁵ They are likewise subject to the same burdens imposed on other corporations. For the payment of a license-fee does not exempt a foreign corporation from taxes levied upon all corporations doing business in the Commonwealth.⁶ If, however,

¹ *Commonwealth v. American Dredging Co.*, (1888) 122 Pa. St. 386.

² *San Francisco v. Liverpool &c. Ins. Co.*, (1887) 74 Cal. 113; s. c. 5 Am. St. Rep. 425.

³ *San Francisco v. Liverpool &c. Ins. Co.*, (1887) 74 Cal. 113; s. c. 5 Am. St. Rep. 425.

⁴ *Trustees Exempt Firemen's Fund v. Roome*, 93 N. Y. 325; s. c. 45 Am. Rep. 217.

⁵ *San Francisco v. Liverpool &c. Ins. Co.*, (1887) 74 Cal. 113; s. c. 5 Am. St. Rep. 425.

⁶ *New York, L. E. & W. R. Co. v. Commonwealth*, (1889) 129 Pa. St. 463; s. c. 7 Ry. & Corp. L. J. 14. In this case the New York, Lake Erie &

Western Railroad Company, a foreign corporation, was permitted by Pa. Acts of Feb. 16, 1841, Priv. Laws, 28, and of March 26, 1846, Priv. Laws, 179, to build a portion of its road in the State on payment of ten thousand dollars annually to the State after its completion. And it was held that the Act of June 30, 1885, § 4, taxing the indebtedness of corporations doing business in the State, and compelling them to collect that tax, applied to this company, and did not impair the obligation of the contract between the State and the corporation, as set forth above in the private statutes. The court said in conclusion: “Thus

the statutes of a State permit foreign corporations to do business therein, but impose on them conditions which could not be imposed on citizens, the permit is held to be valid while the condition is void.¹ Accordingly, a State can not levy a tax on foreign corporations licensed to do business therein, if its constitution prohibits it from levying a like tax on its own inhabitants.² But the two classes of cases, one of which is plainly taxation, and the other a sum paid for a permit, may be approximated until it is difficult or impossible to say to which class a given case may belong. These difficulties in discriminating the principles underlying different cases constantly included in different classes, and to which the same rule of decision can not be applied, constitute the perpetual debating-grounds of the law, and occasion much of the confusion of the decisions.³

§ 821. (e) Interstate railway and transportation companies.—When these companies become instrumentalities of interstate commerce, the federal courts have jurisdiction without regard to the citizenship of the parties.⁴ And many questions have arisen in respect of attempts on the part of the States to impose taxes which are in effect a regulation of interstate commerce,—thus whether a State may impose a tax

it will be seen that the defendant exercises powers and franchises which it has received directly from the legislation of Pennsylvania; that a part of its property is actually within the limits of this State, and received the protection of our laws; and there is no good reason why the company should not be held subject to the same regulations as corporations of our own State.”

¹San Francisco v. Liverpool &c. Ins. Co., (1887) 74 Cal. 113; s. c. 5 Am. St. Rep. 425.

²San Francisco v. Liverpool &c. Ins. Co., (1887) 74 Cal. 113; s. c. 5 Am. St. Rep. 425. See further as to the power of a State to discriminate against foreign corporations, the exhaustive note to *Ducat v. Chicago*, 95 Am. Dec. 536.

³Temple, J., in *San Francisco v. Liverpool &c. Ins. Co.*, (1887) 74 Cal. 113; s. c. 5 Am. St. Rep. 425, 429.

⁴United States Ex. Co. v. Allen, (1889) 39 Fed. Rep. 712; but holding that under Act of Congress, March 3, 1887, providing that no civil suit shall be brought in either the district or circuit court against any person by any original process in any other district than that whereof he is an inhabitant, except when jurisdiction is founded only on the fact that the action is between citizens of different States, a suit to enjoin collection of a tax on the ground that it violates the federal constitution, must be dismissed as to such defendants as are non-residents of the district in which it is brought.

upon freight carried into or out of its territory;¹ whether it may tax *in transitu* through its jurisdiction, goods transported from one State to another;² whether it may impose a license or privilege tax upon foreign companies doing interstate business;³ whether it may tax the gross receipts of foreign companies derived in part from interstate traffic;⁴ and each of these questions has been decided in the negative. In short no State has the right to lay a tax on interstate commerce in any form; whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce and amounts to a regulation of it which belongs solely to congress.⁵ But a distinction is made between taxing the gross receipts of foreign companies and domestic; and it is held that the State may impose a tax of that kind upon its own railways even though the receipts be partly derived from interstate traffic.⁶ And the same rule is applied

¹ State Freight Tax Case, 15 Wall. 232; Philadelphia &c. S. S. Co. v. Pennsylvania, 122 U. S. 326; Fargo v. Michigan, 121 U. S. 230; Telegraph Co. v. Texas, 105 U. S. 460; Erie Ry. Co. v. New Jersey, 2 Yroom, 531.

² Fargo v. Michigan, 121 U. S. 230; Coe v. Errol, 116 U. S. 517.

³ United States Ex. Co. v. Allen, (1889) 39 Fed. Rep. 712; s. c. 7 Ry. & Corp. L. J. 45, holding that Tenn. Act of March 29, 1887, imposing a license tax upon express companies, is unconstitutional, as invading the exclusive power of congress to regulate interstate commerce, as against an express company engaged in interstate transportation; and that Tenn. Act of April 8, 1889, providing that a tax shall be paid for transporting one or more packages between points within the State, the amount being regulated by the length of the company's lines, is, in effect, a tax on interstate busi-

ness, and is unconstitutional; citing and quoting *Leloup v. Mobile*, 127 U. S. 645: "Ordinary occupations are taxed in various ways, and in most cases legitimately taxed; but we fail to see how a State can tax a business occupation when it can not tax the business itself. Of course, the exaction of a license tax as a condition of doing any particular business is a tax on the occupation; and the tax on the occupation of doing a business is surely a tax on the business."

⁴ Cf. *Telegraph Co. v. Texas*, 105 U. S. 460.

⁵ *Leloup v. Port of Mobile*, 127 U. S. 640, 648.

⁶ *Baltimore & O. R. Co. v. Maryland*, 21 Wall. 456; *Minot v. Philadelphia, W. & B. R. Co.*, (1873) 18 Wall. 206; *State Freight Tax Case*, 15 Wall. 232. Cf. *Railroad Co. v. Maryland*, 21 Wall. 456, where a charter stipulation that the railway should pay a part of its earnings as a bonus to the State, was considered

to a franchise tax proportioned to the capital stock and dividends of companies organized under the laws of the State imposing it, even though they be engaged in interstate commerce.¹

§ 822. (f) **Sleeping and parlor car companies.**—Sleeping and parlor cars, being usually owned by corporations distinct from the railway companies over whose lines they are run, and these corporations having extensive business in many States, the question of their taxation becomes one of the taxing of interstate commerce. Thus an attempt on the part of the State of Texas to impose a privilege tax upon every sleeping-car not owned by the railway companies, run over their lines in the State, has been declared to be a regulation of interstate commerce and unconstitutional.² But where sleeping-cars are run wholly within a State, the business may be taxed as a privilege.³ For every State, exercising the sovereign power of taxation, may tax all articles of property found within its borders, and all business carried on there, whether owned and done by its own citizens or foreigners. The protection given

different in principle from a tax and not unconstitutional.

¹ *People v. Wemple*, (1889) 117 N. Y. 136; s. c. 7 Ry. & Corp. L. J. 127, where Danforth, J., said: "We are also of opinion that the tax sought to be enforced is neither in form nor substance obnoxious to any provision of the federal constitution. It interferes in no respect with commerce with foreign nations or among the several States. It is confined to capital employed in this State by an entity existing under its laws, and the manner in which its value shall be assessed and the rate of taxation are matters of legislative discretion. In no aspect does it profess 'to regulate commerce,' nor in any proper sense has the legislation in question that effect."

² *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34.

³ *Gibson County v. Pullman South-*

ern Car Co., (1890) 42 Fed. Rep. 572; s. c. 8 Ry. & Corp. L. J. 263, where the court said: "It must be conceded that the State of Tennessee had the right to tax the two sleeping-cars engaged in business between Nashville and Memphis, wholly within the State, and that so far as the federal authority is concerned, that power of taxation is plenary. The authorities need not be cited here, since it is not necessary to support the concession made to the plaintiff on that point, and the cases in the Supreme Court upon the subject of taxation, in its relation to interstate commerce, are far too numerous and well known to require any especial application of them to this case. The very latest of them cites the others, and fully establishes this ruling. *Western Union Tel. Co. v. Alabama State Board*, 132 U. S. 472."

while within the State is the consideration received for the contribution by taxation to the exchequer of the power that protects, and the fact that the same property or business may be taxed by the home power of the foreigner, because of its authority over him and his property wherever situated, does not impose any restriction on the taxing power of the State where the property is situated or the business carried on by him. That fact, however, and other considerations of amity and comity among nations, induce each to withhold, generally, any taxation of articles which are merely in transit through the territory, or business temporary in character; but this exemption is purely voluntary and gracious, except so far as mutual benefits derived from civilized international intercourse may influence it. The only restrictions upon this plenary power of the State must be found in its constitution and those obligations which it assumed by entering into the federal compact. Where there is no discrimination in the statutes against the property or business of the citizens of other States, and the business of running cars to furnish sleeping and other comfortable accommodations to passengers between points wholly within the State, being domestic; and not interstate commerce, there can not be said to be any violation of the federal constitution in exercising the taxing power over them.¹ Whether counties may levy a similar tax depends upon whether the statutes of the State authorize them to do so.² The authorization must be express

¹ *Gibson County v. Pullman Southern Car Co.*, (1890) 42 Fed. Rep. 572; s. c. 8 Ry. & Corp. L. J. 263.

² *Gibson County v. Pullman Southern Car Co.*, (1890) 42 Fed. Rep. 572; s. c. 8 Ry. & Corp. L. J. 263, where Hammond, J., criticises our American system of tax legislation as follows: "It is undoubtedly generally true that whenever the State levies a tax, the counties are authorized to levy a similar tax, not exceeding the State tax or that specially fixed by the act, and this is always so, I think, in a general revenue law. There is no nicely adjusted system of

revenue laws, and of all subjects of legislation these are the most characterized by want of uniformity and system, and are irregular and slipshod in habit, not to say slovenly; yet it will be seen that there is a habit about it that precludes that which the county assumes in this case, which is that once in a while a general revenue statute, or a pair or several of them, will be attempted, wherein taxes are authorized for State and county purposes, the county being always specially mentioned, and all other acts are repealed. Then commences the pro-

and is not to be lightly implied from loose and ill-considered statutes. For a sleeping-car company can hardly be said to be doing business in a county through which its cars are carried in the course of a few minutes.¹

• cess of patching and tinkering, often unskillfully done and creating more confusion, but the general law remains the foundation of the amendatory legislation until the confusion becomes so great that a new start is made by another general law, to be put through the same process of amendment as before. These amendatory acts do not always couple the county with the State, but sometimes do, and the authority of the county depends upon the original act, as often the State levy does also, notwithstanding the amendatory act. But this is an entirely different habit from that urged here in behalf of the county, that the code confers a general power, and nothing excludes it but special exclusion of the county in the particular act. So far as these revenue laws are concerned, the codes are as transitory as the other tax laws are found to be, and only embody the general foundation act in existence at the time the code happens to be enacted. There is not an intention by a fixed code statute to give the counties general power of taxation to operate somewhat like a constitutional power would act, and only to be withdrawn by special exclusion of the counties, but they must, like the State, take their chances in the constantly changing revenue enactments, and depend upon them for whatever authority they give when construed altogether. It might be a very useful and beneficial power for the counties to be comparatively exempt from changing authority, and thus have a right to tax, absolutely, whenever the State taxes, unless for-

bidden, but such is not our law nor our habit of legislation, as any one will see upon careful investigation historically and critically made." See also *Carlisle v. Pullman Palace Car Co.*, (1886) 8 Colo. 320; s. c. 54 Am. Rep. 553.

¹ *Gibson County v. Pullman Southern Car Co.*, (1890) 42 Fed. Rep. 572, where the court criticising the Tennessee act said: "The original sleeping-car tax was a special and fixed tax, not found in a general revenue law, nor intended as an amendment extending the county tax to that subject of taxation. It was a loose and evidently ill-considered bit of legislation in not making the intention more manifest, but in the very nature of the case, in view of the business taxed, it probably never occurred to the draughtsman or the legislature that running a sleeping-car across a county a few minutes each day was such a doing of business in that county as would justify its taxation, as a privilege, by counties. It was so incongruous in its relation to county taxation that it did not occur to the legislature that such a construction could be claimed for it. And, really, no business is carried on in Gibson county when the car rolls through it, possibly in sixty minutes or less, and taxable county privileges are those where the business is located and done in the county. To use the illustrations of the counsel for the plaintiff, the peddler, although in one sense transitory, really is, for the time being, located in Gibson county, and sells quite exclusively to its population while there, and so the circus shows

§ 823. (g) **Telegraph and telephone companies.**—The State may tax such real and personal property of telegraph companies as is located within its borders.¹ But neither the State nor a municipality can impose a license tax upon lines used in the transmission of interstate messages.² Neither can the State or municipal governments impose a tax upon the gross receipts of telegraph companies a part of whose earnings is from interstate messages.³ A tax of gross receipts is not

almost exclusively to them for the time being; but the sleeping-car, while it may take up a Gibson county man now and then, or sell a ticket at its stations to him who enters the cars, can hardly be said to be doing business in that county in such a sense as would justify taxing it as a privilege by counties, while as to the whole State it might be fair and well enough to tax the privilege, as has been done by these acts. It is in the light of such considerations as these that we arrive at the legislative intention, certainly when we are asked to imply it, in the absence of all express declaration to that end which is contrary to all sense of justice."

¹City of St. Louis v. Western U. Tel. Co., (1889) 39 Fed. Rep. 59; *s. c.* 6 Ry. & Corp. L. J. 293, citing *Telegraph Co. v. Massachusetts*, 125 U. S. 530; *Leloup v. Port of Mobile*, 127 U. S. 640.

²City of St. Louis v. Western U. Tel. Co., (1889) 39 Fed. Rep. 59, citing *Almy v. California*, 24 How. 169; *Crandall v. Nevada*, 6 Wall. 35; *State Freight Tax*, 15 Wall. 232; *Car Co. v. Nolan*, 22 Fed. Rep. 276; *Leloup v. Port of Mobile*, 127 U. S. 640, and holding that a tax of five dollars a year upon every pole in the city is a "license tax" and not within the city's charter power to "regulate" telegraph companies. "By virtue of such power," said Thayer, J., "the city authorities may undoubt-

edly make reasonable regulations touching the location of telegraph poles, their height and size, and very likely, as was recently held by Judge Wallace in the southern district of New York, (*Telegraph Co. v. Mayor*, 38 Fed. Rep. 552,) may require them to be carried underground rather than overhead. The section of the ordinance on which this suit is based is not, however, a regulation of that character, nor is it in any proper sense a regulation, within the meaning of the city charter. The object of the enactment was evidently to secure revenue for the municipality; hence the burden imposed is a tax, and it is imposed in such form that it can only be regarded as a privilege or license tax which the city has no authority to impose."

³*Western Union Tel. Co. v. Seay*, (1889) 132 U. S. 472. In this case the Supreme Court, referring to similar cases decided in that court, said but little remained except to show that this case comes within the same principle. "That principle is, in regard to telegraph companies which have accepted the provisions of the Act of Congress of July 24, 1866, sections 5263 to 5268 of the Revised Statutes of the United States, that they shall not be taxed by the authorities of a State for any messages, or receipts arising from messages from points within the State to points without, or from points with-

wholly invalid, however; but is invalid only in proportion to the extent that the gross receipts are derived from interstate commerce.¹ Neither is the capital stock of a foreign tele-

out the State to points within, but that such taxes may be levied upon all messages carried and delivered exclusively within the State. The foundation of this principle is that messages of the former class are elements of commerce between the States, and not subject to legislative control of the States, while the latter class are elements of internal commerce, solely within the limits and jurisdiction of the State, and therefore subject to its taxing power. The following cases in this court have fully developed and established this proposition: *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Telegraph Co. v. Texas*, 105 U. S. 460; *Telegraph Co. v. Massachusetts*, 125 U. S. 530; *Ratterman v. Telegraph Co.*, 127 U. S. 411; *Leloup v. Port of Mobile*, 127 U. S. 640; *Fargo v. Michigan*, 121 U. S. 230; *Steamship Co. v. Pennsylvania*, 122 U. S. 326. . . . In the earliest of these cases, *Telegraph Co. v. Telegraph Co.*, the statute of Florida had attempted to confer upon a corporation of its own State, the *Pensacola Telegraph Company*, an exclusive right of doing the telegraph business within that State. This court held, affirming the judgment of the circuit court of the United States for that district, that this statute was a regulation of commerce among the States forbidden by the constitution of the United States to the State of Florida. In the next case, that of *Telegraph Co. v. Texas*, 105 U. S. 460, in which the State had imposed a tax of one cent for every full-rate message sent, and one-half cent for every message less than full-rate, on the business of the *Western Union*

Telegraph Company, many of the messages were by the officers of the government, on public business, and a large portion of them were to places outside of the State. The company contested the constitutionality of this law, and the case came to this court, where it was said that a telegraph company occupies the same relation to commerce, as a carrier of messages, that a railroad does as a carrier of goods. . . . The case of *Telegraph Co. v. Massachusetts*, 125 U. S. 530, was a question growing out of the taxation of the telegraph company by the State of Massachusetts, and the same principle we have already considered was asserted in that case, after a general review of the authorities upon the subject." In *Leloup v. Port of Mobile*, 127 U. S. 640, the question arose upon a conviction, under the statute of Alabama, on an indictment for failing to take out a license tax by the telegraph company, imposed by the city of Mobile on all telegraph companies. Edward Leloup, the agent of the company, was convicted under this proceeding, his conviction affirmed by the Supreme Court of Alabama, and its judgment brought to this court on writ of error. This court held that, his company having complied with the act of Congress of July 24, 1866, the State could not require it to take out a license for the transaction of business in the city, and that a general license tax on the telegraph company affected its entire business, interstate as well as domestic and internal, and was unconstitutional."

¹ *Ratterman v. Telegraph Co.*, 127 U. S. 411,

phone company having no officer or agent in the State, and doing business there only in renting instruments to other corporations, which own the wires and operate the telephones, under contracts made outside the State, taxable in the State, although the instruments remain the property of the company, and it reserves the right in certain events to take possession of and operate them.¹ There is a decision in New York, however, to the contrary, in which the same company was held liable to taxation on such part of its capital as is employed in that State, on dividends realized thereon and on its gross earnings within the State, upon the ground that the

¹ *Commonwealth v. American Bell Tel. Co.*, (1889) 129 Pa. St. 217; S. C. 7 Ry. & Corp. L. J. 99. The court, per Paxon, C. J., in affirming the judgment below, said: "The company is a corporation created by the laws of the State of Massachusetts. Its principal office or place of business is in the city of Boston. It has no office, agent, or place of business in this State. All the contracts for rent and royalty of telephones were made in Boston, and the payments therefor were made there. It leases to certain Pennsylvania corporations the use of the telephone and furnishes the instruments, which remain the property of the company, and are to be paid for, whether used or not. The Pennsylvania corporations carry on the business here. They construct and own the necessary lines of wire, switches, switchboards and other apparatus necessary to carry on the business. They maintain their own offices, and employ and pay the officers and agents needed to carry it on. The telephone company transacts no business here. It has no part of its capital or property here, except the instruments in question, which, as before observed, are leased to Pennsylvania corporations with a license to use the same. Under such a state of facts it would

seem clear that the telephone company could not be taxed as doing business within this State. It was contended, however, on the part of the Commonwealth, that because the company has in its contract with the Pennsylvania corporations reserved a certain power of control over telephones leased to them, and might, upon certain breaches of said contracts, enter upon, take possession of, and operate said telephones, the said company was doing business here, and became liable to the tax. There is a wide distinction, however, between the right to do business and actually doing it. It may be that should said company proceed to enforce their rights under these contracts, and after taking possession of the telephones operate them, it would be doing business here. But that contingency has not arrived. It is to be observed that this was not a tax upon the instruments owned by the company, and operated here under license. The instruments as such are perhaps within the taxing power of the Commonwealth, for the reason that they are here, and within her jurisdiction. It matters not to the State to whom they belong. But the State has not laid such a tax. On the contrary, it is a tax upon capital stock; and, as the com-

local companies were merely its agents, and that it was, accordingly, "doing business within the State."¹

§ 824. Taxation of shareholders — Double taxation.—

A tax on the shares of stockholders in a corporation is a different thing from a tax on the corporation itself or its stock, and may be laid irrespective of any taxation of the corporation where no contract relations forbid.² Upon this principle that the tangible property of a corporation and the shares of its stock are distinct kinds of property under different ownership, the former being the property of the corporation, the

pany transacts no business within the State, no portion of its capital is here in point of fact or by construction of law. Authorities are scarcely needed for so plain a proposition. It is sufficient to refer to *Commonwealth v. Oil Co.*, 101 Pa. St. 119." *Commonwealth v. American Bell Telephone Co.*, (1889) 129 Pa. St. 217.

¹The American Bell Telephone Company of Massachusetts licenses corporations to do business in New York under the "exchange system," by which a central office is established, and communication carried on through it. The instruments are supplied by the company, and remain its property, and a royalty is paid to it on each, though they are leased by the local corporations to their subscribers. The other apparatus belongs to the local corporations. The latter make the leases, and collect the rents, but each lease stipulates that the company owns the instruments, and the company reserves the right to intervene and collect its portion of the rents. Another form of contract with the local corporations provides for connecting lines on similar terms, reserving to the company the right to use the telephones thereon, and to connect the lines with the lines of the local corporations in order to forward through messages, and provides for

a division of the tolls, and that the leases shall express the title of the company to the instruments, and the company may enforce, or require the local corporation to enforce, all its rights against the subscriber. Leases for private lines are made directly with the company, and countersigned by the local corporations, which collect the rents, and transmit them to the company. The company also has lines connecting with the offices of the Western Union Telegraph Company, under an arrangement by which it receives a certain proportion of the income derived from that business. And as stated in the text, it was held that the local corporations are merely the agents of the company, which thus does business within the State, within the intendment of N. Y. Laws of 1881, ch. 361, §§ 3, 6, said act being an amendment of Laws of 1880, ch. 542, and is liable to pay the percentage, at least on its capital employed in the State, and on the dividends realized on that capital, as prescribed by section 3 of the act of 1881, and also the tax of five-tenths per cent. on its gross earnings in the State. *People v. American Bell Tel. Co.*, (1889) 50 Hun, 114, Van Brunt, P. J. dissenting.

² Cooley on Taxation, 231.

latter that of the shareholders, it is held that although the company may pay taxes upon its property, yet a tax upon the shares is not unjust as being double taxation.¹ But although the State has the power to levy double taxes, they are never to be presumed in the absence of explicit statutory language.² In many States shares of stock are exempt by statute from taxation when the corporation itself is taxed.³ Under such a statute it is held that the shareholder is not taxable even when the company does not fulfil its duty in returning its property for taxation.⁴ In some States the constitutions forbid double taxation.⁵ Other States tax the shares but collect it from the company.⁶ In others again, in the assessment of the shares to the holders, a proportionate part of the value of the corporate property otherwise taxed, is deducted from each share.⁷ The State having jurisdiction of

¹ *Farrington v. Tennessee*, (1877) 95 U. S. 679, 687; *Belo v. Commissioners*, (1880) 82 N. C. 415; *New Orleans v. Canal Co.*, 32 La. Ann. 51; *Emsly v. Memphis*, 6 Baxter, 553; *Pittsburgh R. Co. v. Commonwealth*, 66 Pa. St. 77; *Whitesell v. Northampton County*, 49 Pa. St. 526; *State v. Thomas*, 26 N. J. 181; *Frazer v. Seibern*, (1866) 16 Ohio St. 614; *Salem Iron Co. v. Danvers*, (1813) 10 Mass. 514; *Tremont Bank v. Boston*, 1 Cush. 142; *Toll Bridge Co. v. Osborn*, (1868) 35 Conn. 7; *Cumberland M. R. Co. v. Portland*, 37 Me. 444; *Danville Banking Co. v. Parks*, 88 Ill. 170; *Porter v. Rockford & R. Co.*, (1875) 76 Ill. 561; *Conwell v. Connersville*, 15 Ind. 159; *Cook v. Burlington*, 59 Iowa, 251. *Cf. Ryan v. Commissioners*, (1883) 30 Kan. 185.

² *New Orleans v. Houston*, 119 U. S. 265; *Tennessee v. Whitworth*, 117 U. S. 136; *Republic Life Ins. Co. v. Pollock*, (1874) 75 Ill. 292; "Taxation of Corporations," by Prof. E. R. A. Seligman, (1890) 5 Polit. Science Quart. 636.

³ N. Y. Rev. Stat. pt. 1, ch. xiii,

tit. 1, § 7; *Gordon v. Baltimore*, 5 Gill. 231; Ala. Rev. Code of 1884, sec. 2, § 8; N. C. Rev. Laws, ch. 102, § 7; S. C. Rev. Stat. ch. xii, sec. 6, § 19; Fla. Dig. ch. 138, § 10; W. Va. Code, ch. 29, § 51; Tex. Rev. Stat. art. 4682; Ohio Rev. Stat. § 2746; Mich. Laws of 1885, ch. 153, § 2; Wis. Rev. Stat. sec. 1038, § 9; Neb. Comp. Stat. ch. 77, art. i, § 7; Idaho Rev. Stat. §§ 1401, 1440; Mont. Act of March 14, 1889, § 9; Utah Comp. Laws, § 2009. In *Cheshire County Telephone Co. v. State*, (1886) 63 N. H. 167, the principle was declared that no legal assessment of taxes can be made against corporate property at the same time that the stock of the corporation is taxed as to its owners.

⁴ *Gillespie v. Gaston*, (1887) 67 Tex. 599.

⁵ Cal. Const. art. xii, § 1, construed in *Burke v. Badlam*, (1881) 57 Cal. 594.

⁶ Ga. Code, § 815; 13 Del. Laws, ch. 393; N. C. Machinery Act of March 11, 1889, § 16; Kan. Comp. Laws, ch. 107, § 6.

⁷ Tenn. Laws of 1868-69, ch. 9, § 9;

the person may tax him upon shares held in a foreign corporation whose property is beyond its jurisdiction,¹ the *situs* of the shares being the residence of the owner when the contrary is not declared by statute.² But the taxing powers of a State are limited to persons and property within and subject to its jurisdiction, and therefore do not extend to intangible personal property owned by a non-resident of the State. Thus, where one residing in the State of New York owns stock representing the debt of the city of Baltimore, it is not taxable by the State of Maryland.³

§ 825. Exemptions — (a) *In general.*—The constitutionality of statutes or charters exempting corporate property from taxation has been considered in a preceding chapter.⁴ But as was said in that connection, an exemption is not to be lightly presumed from the language of a charter or statute.⁵ The power of taxation can be surrendered only by clear and unambiguous language, which will not bear any reasonable construction consistent with a reservation of that power.⁶

La. Acts of 1888, No. 85, § 27; N. H. Gen. Stat. chs. 53–55; Vt. Rev. Laws, tit. 9, ch. 22, § 288; Me. Rev. Stat. tit. i, sec. 14, § 3; Minn. Gen. Stat. ch. xi; Neb. Act of 1879, § 32. And as to banks in New York, N. Y. Laws of 1866, ch. 761; of 1882, ch. 409, § 312.

¹Ogden v. City of St. Joseph, (1887) 90 Mo. 522.

²Ogden v. City of St. Joseph, (1887) 90 Mo. 522.

³City of Baltimore v. Hussey, (1887) 67 Md. 112.

⁴*Vide supra*, § 34. See also Railroad Co. v. Anderson County, 59 Tex. 654; Railroad Co. v. Smith County, 65 Tex. 21. In a recent Kentucky case it was held that an exemption of the stock of The Louisville Water Company from taxation on account of its being owned by the city of Louisville and the company being under obligation to furnish water for fire protection, is contrary to the provision of the State consti-

tution that “no man or set of men are entitled to public emoluments or privileges but in consideration of public services,” since the city owns the stock in its private and not in its governmental capacity, and the obligation to supply water for fires without charge is merely a service rendered by the city to itself. Clark v. Louisville Water Co., (Ky. 1890) 14 S. W. Rep. 502.

⁵*Vide supra*, § 35.

⁶Southwestern R. Co. v. Wright, (1886) 116 U. S. 231, and cases cited *supra*, § 35. Under Laws Wis. 1874, ch. 126, the State granted lands to a railroad company, to aid in the construction of its road, on condition that it should construct twenty miles each year until the road should be completed, patents for a certain amount of the land to be issued to the company on completion of each twenty miles. Laws Wis. 1879, ch. 22, provided that all of such lands theretofore patented, or which might

Thus an exemption from taxation of the capital stock and "all the property and effects" of a railroad company, will not be extended by implication to outlying and detached lands which the corporation had no power to acquire when the exemption was granted; but which were acquired under a power granted by a subsequent charter.¹ And, generally, exemptions of railway property extend only to property necessary to the construction, maintenance and operation of the road, and not to outlying lands acquired for resale or for the timber thereon.² So an act which provides that "the taxes laid upon manufacturing corporations, by and under the revenue laws of this Commonwealth, be, and they are hereby, abolished as to such corporations," does not exempt from taxation the capital stock of a rolling-mill company "invested in dwellings which are reasonably necessary for the use of its employees," as those dwellings, although convenient and advantageous, have no necessary connection with the business for which the company was incorporated.³ The same statute has been held to operate simply on capital employed in manufacturing, and not to exempt the capital of a manufacturing company invested in bonds, mortgages, city lots and store goods.⁴ Likewise, a statute exempting from taxation the real property of a board of trade, so long as occupied by it for the purposes contemplated in its organization, does not exempt such portion of a building owned by the corporation and partly used for board of trade purposes, as is rented to third persons, although the rent is applied to the purposes of the board.⁵ An exemption of railways has been held not to apply to a corporation which, under authority to construct and operate railways and

thereafter be patented, under the law of 1874, should be exempted from taxation of all kinds for ten years. And it was held that the period of exemption did not begin to run as to each batch of land thereafter patented from the date of the patent, and continue ten years therefrom, but began to run at once as to all the land granted, and ceased entirely, as to all, at the end of ten years. *State v. Harshaw*, (Wis. 1890) 45 N. W. Rep. 308.

¹ *Ford v. Delta & Pine Land Co.*, (1890) 43 Fed. Rep. 181.

² *McCulloch v. Stone*, (Miss. 1890) 8 So. Rep. 236.

³ *Commonwealth v. Mahoning Rolling-Mill Co.*, (1889) 129 Pa. St. 360, construing Pa. Act of June 30, 1885, § 20.

⁴ *Appeal of Commonwealth*, (1889) 129 Pa. St. 346.

⁵ *City of Louisville v. Louisville Board of Trade*, (Ky. 1890) 14 S. W. Rep. 408.

to build and use steamships in foreign and domestic trade, constructed a short line of railway, sold it, and subsequently engaged chiefly in running a steamship line.¹ Again, under a general statute empowering towns by vote to exempt from taxation any establishment proposed to be erected and put in operation therein, and the capital used in operating the same, for the manufacture of fabrics of cotton or any other material, and declaring that the vote shall be a contract binding for the term specified therein, it is held that a vote to exempt "any establishment thereafter erected in this town for the manufacture of fabrics," is not sufficient to exempt an establishment not expressly mentioned in the vote.² But under a constitutional provision exempting from taxation the capital, machinery and other property employed in the manufacture of textile fabrics, property of that kind used in making cordage, rope and twine is not taxable.³ Under the city code of Baltimore, which provides that, whenever the *per centum* of the receipts of any passenger railway company now required to be paid to the city for the use of the park fund shall be reduced, the reduction shall apply to the railways hereby authorized to be constructed, it is held that deductions by the city of Baltimore in compromising with street-railway companies in suits for the percentage of their passenger earnings due the city, is not such a reduction as will entitle all companies constructed under the provisions of that code to the same reduction.⁴

§ 826. (b) **From municipal taxes.**—Railway companies are frequently exempted from the payment of "county taxes," but there has been some litigation as to what taxes are properly included in the exemption.⁵ A tax levied to pay the

¹ *International Navigation Co. v. Commonwealth*, (1886) 104 Pa. St. 38, construing Pa. Act of May 1, 1868. 1890) 7 So. Rep. 784, construing La. Const. art. 207.

² *Franklin Falls Pulp Co. v. Franklin*, (N. H. 1890) 20 Atlan. Rep., 333, construing N. H. Gen. Laws, ch. 53, § 10.

³ *Waterbury v. Atlas Cordage Co.*, (La. 1890) 7 So. Rep. 783; *Hernsheim v. Atlas Steam Cordage Co.*, (La.

⁴ *Baltimore Union Pass. Ry. Co. v. City of Baltimore*, (Md. 1890) 18 Atlan. Rep. 917, construing Balt. Rev. City Code of 1885, p. 323.

⁵ Mo. Act 1868, p. 151, repealing former acts relating to taxes for maintenance of public roads, provides in section 7 that county courts may borrow money on the credit of

bonds of the county, given by it for stock in a railroad company, is a county tax; and this, although the bonds can only be paid out of the tax levied for that special purpose.¹ But in the case above cited a local tax levied only on property within the limits of a particular township to pay township funding bonds, has been held not to be a county tax within the meaning of the defendant's charter.²

§ 827. (c) Charitable, scientific etc. institutions. — Benevolent, religious, scientific and educational associations and corporations are frequently exempted by the constitutions and general laws from payment of taxes.³ These provisions generally contain a proviso that the property must be used exclusively for the purposes designated in order to receive the benefit of exemption from taxation. If used for other purposes, it then becomes liable to taxation, although the proceeds are to be applied for the promotion of the institution.⁴

the county for the purpose of opening and repairing public roads, and levy a tax to meet the interest thereon. Section 27 provides that, for the purpose of opening, repairing and improving roads, and in order to raise the necessary funds, the county courts shall levy a special tax, which shall be known as the "road tax," this levy to be made as the county revenue is levied; and that all property subject to pay a county tax shall be made subject to pay a road tax. Subsequent acts classify all taxes into State, county, township, school and municipal taxes. It is held that the road tax is a county tax, within the meaning of the special charter of the defendant company (Mo. Act 1847, p. 157, § 4), exempting it from payment of county taxes. *State v. Hannibal & St. J. R. Co.*, (Mo. 1890) 13 S. W. Rep. 406. Mo. Acts 1847, p. 157, gives to defendant company all the privileges and immunities which were granted to the Louisiana & Columbia Railroad Company by

Acts 1836-37, p. 252, which provide, *inter alia*, that "the stock of said company shall be exempt from all State and county taxes." Act Sept. 20, 1852, granting lands to defendant, and accepted by it, provides that it shall "pay into the treasury of the State a sum of money equal to the amount of State tax on other real and personal property of like value for that year, upon the actual value of the road-bed and other property of the company." But it is held that this act in no way affects defendant's charter exemption from taxation for county purposes. *State v. Hannibal & St. J. R. Co.*, (Mo. 1890) 13 S. W. Rep. 505.

¹ *State v. Hannibal & St. J. R. Co.*, (Mo. 1890) 13 S. W. Rep. 505.

² *State v. Hannibal & St. J. R. Co.*, (Mo. 1890) 13 S. W. Rep. 505.

³ *E. g.* Mo. Const. art. x, § 21.

⁴ *Trustees v. Exeter*, 58 N. H. 306; *Old South Society v. Boston*, 127 Mass. 378; *Orr v. Baker*, 4 Ind. 86; *Trustees v. Ellis*, 38 Ind. 3; *Connecticut &c. Assoc. v. East Lyme*,

The English tax upon associations and companies exempts, *inter alia*, property which, or the income or profits whereof, shall be legally appropriated and applied for any purpose connected with any religious persuasion, or for any charitable purpose, or for the promotion of education, literature, science or the fine arts; property belonging to or constituting the capital of a body corporate or unincorporate established for any trade or business; property acquired by or with funds voluntarily contributed to any body corporate or unincorporate within a period of thirty years immediately preceding; and property on which legacy or succession duty has been paid.¹ There is a statute in New York exempting every "incorporated company" not liable to taxation on its capital stock.² The difficulty under these statutes is in determining whether particular associations or corporations are within the exemption; whether, looking at the facts of the case, the objects of the body claiming exemption and the manner in which those objects have been carried out, it is entitled to immunity.³ Masonic lodges are generally considered as institu-

54 Conn. 152; *State v. Board*, 34 La. Ann. 668; *State v. Board*, 34 La. Ann. 574; *Blackman v. Houston*, 39 La. Ann. 592; *Washburne College v. Shawnee County*, 8 Kan. 344; *Cincinnati College v. State*, 19 Ohio, 110; *St. Mary's College v. Crawl*, 10 Kan. 442; *Morris v. Lone Star Chapter*, 68 Tex. 698; *First M. E. Church v. Chicago*, 26 Ill. 482; *Wyman v. City of St. Louis*, 17 Mo. 335. *Cf.* *Massachusetts Gen. Hospital v. Somerville*, 101 Mass. 319; *Monticello Seminary v. People*, 106 Ill. 398; "Non-Taxable Institutions," by D. H. Pingrey, (1890) 31 Cent. L. J. 25. Accordingly, statutes exempting houses for religious worship, owned by religious societies, do not include a parsonage erected upon the church grounds, or the lands on which it is situated, although the parsonage is occupied by the pastor of the church, rent free. *Third Congregational Soc. v. Springfield*,

147 Mass. 396; *State v. Lyon*, 32 N. J. 360; *State v. Krallman*, 38 N. J. 117; *State v. Axtell*, 41 N. J. 117; *Church v. Board*, 12 Minn. 395; *Hennepin v. Grace*, 27 Minn. 503; *Church v. Providence*, 12 R. I. 19; *Gerke v. Purcell*, 25 Ohio St. 229; *Trustees v. Ellis*, 38 Ind. 3. *Cf.* "Taxation of Christian Associations," by B. V. Abbott, 12 Chicago L. N. 15; "Taxation of Churches, Colleges & Charitable Institutions," by Lyman H. Atwater, 46 Princeton Rev. 340.

¹ Customs and Inland Rev. Act of 1855.

² N. Y. Rev. Stat. 388, § 4, sub. 7.

³ Commissioners of Inland Rev. v. Forrest, 59 L. T. Rep. N. S. 282; s. c. 29 Q. B. Div. 621. In this case, the institution in question was that of civil engineers. It was incorporated in 1828 by Royal Charter, for the general advancement of mechanical science, and more particularly

tions of purely public charity, and so long as their property is used exclusively for the purposes set forth in the law, it is exempt from taxation. But when their real estate is rented for other purposes, then it becomes subject to taxation.¹ In New York it has been held that a religious corporation is not exempt under the exemption of incorporated companies not liable to taxation on their capital stock.² An association for the encouragement of debating, reading, and literature, and the enjoyment of rational and social amusements, and the playing of ten-pins, chess, and checkers, and other lawful games of the kind, but which excludes all drinks, and has no

for promoting the acquisition of that species of knowledge which constitutes the profession of a civil engineer. The secretary's affidavit stated that the whole property of the institution was, and always had been, exclusively devoted to the furtherance of these objects. The Divisional Court, consisting of Lord Coleridge and Mr. Justice Field, held that this institution did not come within the exemption. On appeal, Lord Justice Lopes agreed with the Divisional Court, but Lord Esher and Lord Justice Fry being of the contrary opinion, the judgment of that court was reversed. "The question in this case," said the Master of the Rolls, "is not one as to the construction of the section, but whether, looking at the facts as to this institution, its main object is the promotion of science, and whether that object has been carried out." "Science," said Lord Justice Fry, "is not the less science because it is also able, in the language of one of its most distinguished professors, 'to be a rich storehouse for the relief of man's estate.' Finally, it is not necessary that it should be science for all; there is nothing to prevent the exception applying to the promotion of science among a particular class." The House of Lords

have agreed with the majority of the Court of Appeal, but the Lord Chancellor dissented. From this case it follows that all institutions which have for their main object the promotion of science will be exempt from this tax, although the members may find the institution an assistance to them in the way of their profession.

¹ *College v. Mercer Co.*, 101 Pa. St. 580; *Institute v. Delaware Co.*, 94 Pa. 163; *Asylum v. School District*, 90 Pa. St. 21; *Donahugh's Appeal*, 86 Pa. St. 306; *Swift v. Easton*, 73 Pa. St. 362; *Gerke v. Purcell*, 25 Ohio St. 229; *Humphries v. Little Sisters*, 29 Ohio St. 201; *Association v. Pelton*, 36 Ohio St. 258; *Morris v. Lone Star Chapter*, 68 Tex. 698; *State v. Board*, 34 La. Ann. 574; *Massenbury v. Grand Lodge*, 81 Ga. 212; *Mayor v. Lodge*, 53 Ga. 93; "Non-Taxable Institutions," by D. A. Pingrey, (1890) 31 Cent. L. J. 25; "Exemption of Friendly and Other Societies," 16 Sol. J. & Rep. 3. Whether fraternities are charities to the extent of having their property free from taxation, see *Hirschl's Law of Fraternities & Societies*, (1883) 8-12.

² *Catlin v. Trustees of Trinity College*, 113 N. Y., 133, construing N. Y. Rev. Stat. 388, § 4, sub. 7.

connection with business purposes, nor politics, nor has in view any pecuniary profit, was held to be exempt from the payment of an incorporation tax under the Missouri exception of associations incorporated for benevolent, religious, scientific, fraternal, beneficial, and educational purposes, and of any association which tends to the public advantage in relation to education, literature, history, or skill among the learned professions.¹ But a club of the ordinary kind can not be said to be formed for the promotion of education, literature, science, or the fine arts; neither can it claim exemption under an exception in favor of property acquired by or with "funds voluntarily contributed."² The English Council of Law Re-

¹ *State v. Lesueur*, (Mo. 1890) 13 S. W. Rep. 237, construing Mo. Rev. Stat. of 1889, §§ 2821, 2825, and holding that so much of Mo. Rev. Stat. of 1889, § 2834, as undertakes to allow corporations to be created for other than benevolent, religious, scientific, or educational purposes, without payment of the tax, violates Mo. Const. art. x, § 21, requiring that corporations other than those mentioned shall provide for a capital stock, and pay a tax.

² *In re New University Club*, 18 Q. B. Div. 720, where it was argued that those who enjoyed the privileges of the club need not have become members unless they chose, and accordingly that the funds were voluntarily contributed. The court, however, disagreed with this contention, for, as Mr. Justice Hawkins pointed out, "Every contract is the result of a voluntary agreement, and yet it is difficult to see how moneys paid out under an obligation imposed by such contract can be said to be a voluntary payment." The same learned judge suggested, without attempting a definition, that this sixth exemption would refer to "property acquired for the mere innocent amusement and recreation, or for promoting the general health and

comfort of the public, from which no special advantage or benefit is sought to be derived by the contributor to the funds raised for its acquisition, for instance, a people's palace, a public recreation ground, public baths and washhouses, or other institutions of a like nature." A similar attempt to escape duty was made by the Linen Drapers' Institution, which had been founded with a view "to afford relief to decayed and distressed linen and woollen drapers, etc.; to extend relief in sickness, assistance to the aged and those past labor and destitute; to aid the widow and to protect the orphan and forlorn child." A large sum was subscribed by donations which formed the nucleus of the funds of the institute, but members also paid subscriptions. Baron Pollock, in his judgment, p. 953, spoke of "the well-known principle that there is a wide distinction between a mere gift by wealthy or benevolent persons to a charity or to individuals for a mere charitable purpose, and the creation of an institution which is really in the nature of a mutual benefit society." Mr. Justice Hawkins pointed out, p. 956, that "the institution has a right to look at the fund in two different ways — that is

porting claimed exemption under an exception of property belonging to or constituting the capital of a body corporate or unincorporate established for any trade or business. The Solicitor-General argued on behalf of the Crown that this council did not carry on a trade or business in the ordinary sense of the term. They had obtained, he urged, a license from the Board of Trade to omit the word "limited" from their registered name, and the board would not grant such a license to a trading company. The Lord Chief Justice thought that it was capable of strong argument that the council carry on a trade, although they make no profits from it, but at all events they carry on a business. Mr. Justice Manisty was of the same opinion, stating that it was never intended to cripple the business of companies by putting the new tax on them.¹

§ 828. (d) **Transmission of exemptions.**—Immunity from taxation is a privilege personal to the corporation to which it is granted,² and does not pass to its successor unless the charter or statute express a clear intent to that effect.³ Thus

to divide it, and to say that a certain portion of the thirty years' accumulations have been derived from voluntary gratuitous contributions within the terms of exemption 6, and from property on which legacy or succession duty has been paid within the terms of exemption 7," and that the institution would not have to pay duty on that portion; but that the contributions of the subscribing members stood on a different footing, and were liable to be assessed, unless it should be shown that they were "legally appropriated and applied for any charitable purpose." *In re Linen Drapers' &c. Inst.*, 58 L. T. Rep. N. S. 949.

¹*In re Incorporated Council of Law Reporting*, 22 Q. B. Div. 279; s. c. 60 L. T. Rep. N. S. 505.

²*Vide supra*, § 35. A consolidation of two railroad companies under the Missouri consolidation act of March 2, 1869, operates as the crea-

tion of a new corporation, wholly distinct from the constituent corporations out of which it is formed, which new corporation derives its powers and franchises from the consolidation act; and since Mo. Const. 1865, art. xi, § 16, prohibiting legislative exemption from taxation, was adopted before the passage of the act, the consolidated corporation does not acquire the immunity from taxation granted in 1857 to one of its constituent corporations. *Keokuk & W. R. Co. v. County Court*, (1890) 41 Fed. Rep. 305, following *State v. Railroad Co.*, (1889) 99 Mo. 80.

³*Vide supra*, § 35; *Wilson v. Gaines*, 103 U. S. 417; *Morgan v. Louisiana*, 93 U. S. 217; *Lord v. Litchfield*, 36 Conn. 116; *New Haven v. Sheffield*, 30 Conn. 160; *State v. Whitworth*, 8 Lea, 594; *People v. Bearsley*, 52 Barb. 205; *St. Louis &c. Ry. Co. v. Berry*, 113 U. S. 465; *Louisville &c. R. Co. v. Palmes*, 109

immunity from taxation does not pass merely by a conveyance of the "property and franchises" of a railroad company under a judicial sale, in a suit brought by the State to enforce a statutory lien, although the company's property was held by it exempt from taxation.¹ So lands embraced in a railroad land grant and exempt from ordinary taxation while held by the corporation for whose benefit the grant was made, become subject to taxation upon the entire beneficial interest of the corporation being conveyed by a trust deed, to secure a specified charge upon the lands exceeding their value, the *cestuis que trustent* being empowered, at their mere election, to take and appropriate the entire property in satisfaction of their claims upon it, so as to leave nothing to revert to the grantor.² But where an act of consolidation grants to the new company the rights and privileges of the original corporations, it is held to confer upon the former an exemption from taxation enjoyed by the latter.³ At a time when the Tennessee constitution of 1834 was in force, an insurance and trust company was incorporated, a provision in its charter declaring that it should "pay to the State an annual tax of one-half of one per cent. on each share of the capital stock subscribed, which shall be in lieu of all other taxes." The name of the company was afterwards changed, and authority conferred on it to do a banking instead of an insurance business, all the "present rights, privileges, and immunities, excepting only that of insurance" appertaining to the old company being transferred to the new; and it was held that the exemption passed to the new company, and that an increase of capital stock beyond the amount originally fixed was exempt in like manner as the original amount.⁴ But only to the extent that property of the original company was exempt from taxation, does the reorganized company enjoy the immunity.⁵ And even though the consolidating act may provide

U. S. 244. Cf. *Memphis & C. R. Co. v. Railroad Commissioners*, 112 U. S. 609.

¹ *Pickard v. East Tennessee, V. & G. R. Co.*, (1889) 130 U. S. 637; s. c. 6 Ry. & Corp. L. J. 131, reversing s. c. 24 Fed. Rep. 614.

² *In re St. Paul, S. & T. F. R. Co.*, (Minn. 1890) 7 Ry. & Corp. L. J. 235.

³ *Tennessee v. Whitworth*, 117 U. S. 145, and cases cited in opinion of Chief Justice Waite.

⁴ *State v. Butler*, 13 Lea, 400.

⁵ *Chesapeake & C. R. Co. v. Vir-*

that the new company shall have all the privileges and immunities of the original companies, yet if their exemption from taxation was qualified by their duties and dependent upon them, and they incapacitated themselves from the performance of those duties by their consolidation, the new company thus formed can not claim the benefit of the exemption.¹

§ 829. (e) **Repeal and forfeiture of exemptions.**—Exemptions from taxation in the nature of bounties, having been granted without consideration, may be repealed by the legislature.² Where, however, one legislature has entered, as it were, into a contract exempting certain property or persons from taxation in consideration of certain advantages accruing to the public, no subsequent legislature can repeal the statute or charter making the exemption.³ Neither can the judicial department of the State forfeit an exemption inherent in property owned by a corporation, upon grounds which are sufficient cause of forfeiture of its franchises. For the immunity of the property from taxation is not a corporate franchise, but is a property right; and although the corporation be dissolved by forfeiture of its charter, the exemption continues for the benefit of those who may have a just claim upon its assets.⁴ But it has been held that the exemption from tax-

ginia, 94 U. S. 718; *Minot v. Philadelphia, W. & B. R. Co.*, (1873) 18 Wall. 206; *Charleston v. Branch*, 15 Wall. 470; *Branch v. Charleston*, 92 U. S. 677; *State v. Philadelphia & C. R. Co.*, 45 Md. 361; *Southwestern R. Co. v. Georgia*, 92 U. S. 676; *Central R. & C. Co. v. Georgia*, 92 U. S. 665; *Philadelphia & C. R. Co. v. Maryland*, 10 How. 376; *Tomlinson v. Branch*, 15 Wall. 460.

¹ *Beach on Railways*, § 555, citing *Railroad Co. v. Maine*, 96 U. S. 499, affirming *S. C. sub nom. State v. Maine Central R. Co.*, 66 Me. 488.

² *Rector & C. v. Philadelphia*, 24 How. 301; *Tucker v. Ferguson*, 22 Wall. 527; *West Wisconsin Ry. Co. v. Supervisors*, 93 U. S. 595, cited *supra*, § 34; “Perpetual Exemption

of Corporations from Taxation,” by A. Martin, a monographic note, 7 Am. L. Reg. N. S. 390; “Authority of the State to Exempt from Taxation,” by Isaac F. Redfield, 10 Am. L. Reg. N. S. 493; “Power of the Legislature to grant Perpetual Immunity from Taxation,” monographic note, 72 Am. Dec. 682, 684.

³ *New Jersey v. Wilson*, (1812) 7 Cranch, 164, and cases cited *supra*, § 34, as resting on that case; “Power of the Legislature to make a Contract whereby the Taxes of the State are put beyond the Control of all future Legislatures,” address by J. W. Judd, 1 Tenn. Bar Assoc. 73.

⁴ *International & G. N. Ry. Co. v. State*, (1890) 75 Tex. 356; *s. c.* 7 Ry. & Corp. L. J. 305, where the court

ation of property employed in manufactures declared by the constitution of Louisiana, is forfeited during the continuance of a lease made for the purpose of closing the factory to limit production and prevent competition.¹ It is not lost, however, by temporary interruptions in operation, but continues as

said: "The exemption is not given to a company named alone, but to its assigns and successors as well; thus evidencing an intention that the exemption from taxation should adhere to the property exempted, and follow it into the hands of whomsoever may become its owner. No such state of facts is shown in the following cases, to which counsel for the State refers, and on which it relies: *Morgan v. Louisiana*, 93 U. S. 217; *Railroad Co. v. Georgia*, 98 U. S. 359; *Railway Co. v. Berry*, 113 U. S. 465; *Railway Co. v. Miller*, 114 U. S. 176; *Pickard v. Railway Co.*, 130 U. S. 687. These cases hold that exemption from taxation given to a named corporation will not inure to the benefit of another that may buy the property, or to a corporation formed from the consolidation of the one holding the exemption and another, in the absence of something showing an intention to fix the exemption on the property into the hands of whomsoever it may go. These decisions, however, are fatal to the proposition that exemption from taxation in such cases is, within the meaning of the law, a corporate franchise, though it may be a franchise owned by a corporation. The act in question, and its acceptance by the company, constitutes, as declared by the legislature, 'an irrevocable contract and agreement between the State and the said company, its successors and assigns,' based on consideration deemed by the legislature sufficient; and under it, the right to the exemption would

continue, in favor of persons or corporations who may become the owners of the property to which the exemption applies, even though the appellant corporation should be dissolved by a decree declaring the forfeiture of its charter. The existence of this right enhances the value of the property to which it applies. Shareholders and creditors must be presumed to have dealt with the corporation on the faith of the contract which gave the exemption, and it can not be taken away by legislation, by dissolution of the corporation, or in any other manner not sufficient to pass title to any other property from one person to another. The right to exemption from taxation is secured by the same guaranty which secures titles to those owning lands granted under the act, and though the corporation may be dissolved, will continue to exist in favor of persons owning the property to which the immunity applies. Lawful dissolution of a corporation will destroy all its corporate franchises or privileges vested by the act of incorporation; but if it holds rights, privileges, and franchises having the nature of property, secured by contract based on valuable consideration, these will survive the dissolution of the corporation, for the benefit of those who may have right to or just claim upon its assets."

¹ *Waterbury v. Atlas Cordage Co.*, (La. 1890) 7 So. Rep. 783; *Hernsheim v. Atlas Steam Cordage Co.*, 7 So. Rep. 784, construing La. Const. art. 207.

long as the factory exists and the property is set apart for the purpose required.¹ And under a constitutional and statutory provision reserving the right to alter, suspend, or repeal corporate charters, an act is valid which requires a street-railroad company to pay annually into the city treasury one per cent. of its gross earnings in lieu of a fee of a certain amount for each car used by it, as required by its charter. The subsequent act must be deemed an amendment of the charter in that respect.²

§ 830. Injunction.—Where a company, under the law, is not liable at all to taxation on its personal property, and the levy is made in such a way as to directly interfere with its business, equity will interfere, by injunction, to restrain the enforcement of the tax.³ But a petition to enjoin the levy of taxes on property which is only in part exempt from taxation must show to what extent the property is exempt.⁴ Upon the general principle that where officers refuse or neglect to defend the corporate interests the shareholders themselves may act in behalf of the company, they may defend a suit brought to collect an unauthorized tax or may bring suit to enjoin its payment.⁵

¹ *Waterbury v. Atlas Cordage Co.*, (La. 1890) 7 So. Rep. 783; *Hernsheim v. Atlas Steam Cordage Co.*, (La. 1890) 7 So. Rep. 784.

² *City of New York v. Twenty-Third St. Ry. Co.*, 118 N. Y. 389.

³ *Lenawee Co. Sav. Bank v. City of Adrian*, (1887) 66 Mich. 273.

⁴ *City of Louisville v. Louisville Board of Trade*, (Ky. 1890) 14 S. W. Rep. 408.

⁵ *Greenwood v. Union Freight Co.*, (1881) 105 U. S. 13; *Dodge v. Woolsey*, 18 How. 331; *State Bank of Ohio v. Knoop*, 16 How. 369; *Dela-ware Railroad Tax Cases*, (1873) 18 Wall. 206; *Wilmington R. Co. v. Reed*, (1871) 13 Wall. 264; *Paine v. Wright*, 6 McClain, 395; *Footte v. Linck*, 5 McClain, 616.

CHAPTER XLI.

VISITATION, AND HEREIN OF COMBINATIONS, POOLS AND TRUSTS.

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| <p>§ 831. Introductory.</p> <p>832. <i>Quasi</i>-public corporations —
 (a) In general.</p> <p>833. (b) Railway carriers.</p> <p>834. (c) Water companies.</p> <p>835. (d) Gas companies.</p> <p>836. (e) Telegraph and telephone
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 ing trusts.</p> <p>856. The bibliography of trusts.</p> |
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§ 831. **Introductory.**—To render the charters or constitutions, ordinances and by-laws of corporations of perfect obligation, and generally to maintain their peace and good government, these bodies are subject to visitation, or in other words to the inspection and control of tribunals recognized by the laws of the land.¹ Although the rule, that in the ab-

¹ Angell & Ames on Corporations, § 684. Thus in *American Printing House v. Trustees*, 104 U. S. 711, the plaintiff corporation was organized in Kentucky for the purpose of printing books for the blind, and provided in its charter that the presidents of the States' boards of trustees contributing to the general scheme should constitute a board of visitors with the right to visit the printing-house, examine its books, investigate the proceedings of its trustees, and to appoint new ones in case of mismanagement. With this provision in view a board of trustees was organized in Louisiana and received contributions for the Kentucky corporation. Subsequently the charter of the latter corporation was altered by the legislature so that the right of visitation was no longer left to the presidents of the State boards of trustees. The contributors thereupon demanded a return of their money, and the Kentucky corporation brought suit against the Louisiana board to re-

sence of any appointment of visitors by the founder, the visitatorial power rests in his heirs, seems always to have been recognized as law in this country, yet the difference between the condition of heirs in England, where the inheritance descends to the eldest son or brother, and in this country, where it vests in all the children, male and female, indifferently, is such as would render the rule extremely difficult of application in practice, especially after a considerable lapse of time and many descents cast.¹ Accordingly, while the internal affairs of ecclesiastical and eleemosynary corporations, are, in some instances, still inspected and controlled by private visitors,² civil corporations are visited by the government itself, generally through the medium of the courts of justice,³ but sometimes through boards of visitors appointed by the State.⁴ Thus the Medical College of Virginia incorporated in 1854, is a public corporation, the visitatorial authority is in the State, the power of removing and appointing the visitors is reserved in the charter to the legislature, and the governor has authority only to fill vacancies caused by death, resignation, or otherwise; he may not remove and so create a vacancy in order to fill it.⁵ But visitation, strictly speaking, is now of but little

cover the same, and it was held that the change in the charter was such as to excuse defendant from making payment to plaintiff, especially since the original contributors insisted on a return of their money.

¹ Angell & Ames on Corporations, § 687.

² Angell & Ames on Corporations, § 684; *Maryland Univ. v. Williams*, 9 Gill & J. 401; "Powers of Visitation in Eleemosynary Corporations," 19 L. Mag. 1; "*Mandamus* in Ecclesiastical Cases in America," 18 L. Rep. 421.

³ Angell & Ames on Corporations, § 684; *Kyd on Corporations*, 174; 2 *Kent's Commentaries*, 800, 801; *Burney's Case*, 2 Bland, Ch. 141. See generally: *State v. Railway Co.*, 45 Wis. 592; "Police Powers and Boards of Health," 6 N. J. L. J. 135; "Subjection of Private Rights to

Police Powers of the State," by W. P. Wade, 6 So. L. Rev. N. S. 59; "Public Policy & Police Powers of the State," by Alfred Orendorff, 5 Ill. St. Bar Assoc. Rep. 72; "*The Brooklyn Bridge Case — Mandamus*," 20 Alb. L. J. 44; "*Mandamus* in United States Courts," by Glendower Evans, 19 Am. L. Rev. 505; "*Mandamus* in Ohio," by H. L. Peeke, 13 W. L. Bul. 507; "*Mandamus* in Ohio," by W. H. Pope, 15 W. L. Bul. 47; "Legislative & Judicial Control over Charters of Incorporation," by C. J. Ingersoll, 5 Dem. Rev. 99; "Corporate Duties," 1 L. J. 480; "Indictment of Corporations," by Adelbert Hamilton, 6 Crim. L. Mag. 317.

⁴ As, for example, boards of railway commissioners.

⁵ *Lewis v. Whittle*, 77 Va. 415.

practical importance as compared with the subject of State and federal control of civil corporations. This governmental control of corporations seems to be founded quite as much upon the broad basis of public policy as upon the idea that the sovereign or State has succeeded to the rights of prehistoric founders; for we find it declared that this power over corporations is co-extensive with the State's control of individuals,¹ the inference being that the exercise thereof does not depend upon the technical system of law peculiar to corporate bodies.

§ 832. Quasi-public corporations — (a) In general. —

There are other grounds upon which the State assumes peculiar control over certain kinds of corporation, to wit, that they are and were created to be governmental agents; that they are employed and partake in the administration of the public affairs;² that they have control of funds belonging to the State or federal government;³ or that they conduct a business in which the public has an interest,⁴ extraordinary pow-

¹ *Bank of the Republic v. Hamilton*, 21 Ill. 53. Such general rights and powers of corporations as are not intended to be secured to them as property, are subject to legislative control in the same manner as individuals, *Bank of the Republic v. Hamilton*, 21 Ill. 53.

² It is upon this ground that the federal and State governments exercise peculiar control of banks. "Legislation on Banking," 5 Am. Jur. 73. A corporation authorized to establish a public exchange for receiving deposits of and transferring earnest moneys, stocks, bonds, and other securities, procuring and making loans thereon, and guarantying the payment of bonds and other obligations, is a "loan, mortgage, security, guaranty and indemnity company," and a corporation "having the power of receiving money on deposit," within N. Y. Acts 1874, ch. 324, requiring reports from such corporations to the superintendent of the banking

department. *People v. Mutual Trust Co.*, 96 N. Y. 10. An action against a national bank for a penalty for exacting usurious interest, under Rev. Stat. U. S. § 5198, may be brought in any county or district court of the county in which the bank is located which has jurisdiction of the amount involved. *Bank v. Overman*, (Neb. 1887) 34 N. W. Rep. 107; *Schuyler Nat. Bank v. Bollong*, (Neb. 1890) 45 N. W. Rep. 164. The forfeiture of the rights, privileges and franchises of a bank authorized by Rev. Stat. U. S. § 5239, for violation by its directors of the provisions of the banking act, comes within section 1047, limiting suits for any penalty or forfeiture, accruing under the laws of the United States, to five years. *Welles v. Graves*, 41 Fed. Rep. 459.

³ *State v. White*, 82 Ind. 278; s. c. 43 Am. Rep. 496.

⁴ Such as the carriage of persons and property by rail. *Vide infra*, § 833. So also warehouses and grain

ers and exclusive privileges having been granted them for these purposes.¹ Thus *mandamus* will issue to the trustees and faculty of a public university endowed by congress and supported by State appropriations, to compel the admission of a person improperly rejected.² Although an institution may have been founded originally by private donations, the State has a right to follow its own contributions thereto and to ascertain how they are being applied.³

§ 833. (b) **Railway carriers.**—The sovereign has always assumed peculiar control over common carriers as conducting a business in which the public has an interest,⁴ and in the case of railway carriers an additional basis of governmental control is grounded in the extraordinary franchise of eminent domain conferred upon these companies.⁵ For corporations

elevators are subject to governmental control. *Munn v. Illinois*, discussed *supra*, § 30.

¹ *Vide supra*, § 396. But a contract, whereby a company binds itself, in consideration of certain privileges, to allow the State to use a certain amount of power in a canal to be constructed, does not give the State the right to compel the company to construct the canal. *State v. Folsom Water Co.*, (Cal. 1886) 12 Pac. Rep. 388.

² *State v. White*, 82 Ind. 278; s. c. 43 Am. Rep. 496, holding that a university so endowed and maintained can not refuse admission to one otherwise entitled, because of his refusal to sign a pledge to disconnect himself during his college course from a secret society.

³ "Relation of Bloomingdale Asylum to the State," a Report by Prof. Ordronaux, State Commissioner of Lunacy, (1878) 17 Alb. L. J. 403. *Cf.* Kyd on Corporations, 51.

⁴ *Vide supra*, § 832.

⁵ *Vide supra*, § 396. In *Burrett v. City of New Haven*, 42 Conn. 174, it is declared that the charters of corporations which confer exclusive

privileges for the particular advantage of the grantees, are to be construed liberally for the benefit of the public, and strictly as against the corporations, and that the duty of a railroad company, under its charter, to restore a highway to its former usefulness was not discharged when it restored it to a proper condition at the time the railroad was constructed, but the duty was a continuing one. "The duty to maintain the usefulness of streets, under charters which did not in express terms impose the obligation to repair, was enforced in two Minnesota cases—one reported in 36 N. W. Rep. 870, (*State v. St. Paul & C. R. Co.*, Minn. 1888) and the other in 39 N. W. Rep. 154, (*State v. Minneapolis & C. Ry. Co.*, Minn. 1888)." *Memphis, P. P. & B. R. Co. v. State*, (1889) 6 Ry. & Corp. L. J. 389, holding upon the same ground that a street railway company is bound to keep its entire road-bed to the end of its ties, and its crossings, in repair, so as not to obstruct travel across its road, or longitudinally upon it, and this duty is a continuing one whether the charter so expressly requires or not. A street

engaged in carrying goods for hire as common carriers, have no right to discriminate in freight rates in favor of one shipper, even when necessary to secure his custom, if the discriminating rate will tend to create a monopoly by excluding from their proper markets the products of the competitors of the favored shipper.¹ The visitation of railways in England is vested in the Board of Trade,² and in America in the several State Railroad Commissions and the Interstate Commerce Commission. These commissions are invested with general supervision of all railroads and are authorized to inquire into any neglect of their public duties or violation of the State or federal laws.³ And in many matters no appeal lies from them to the regular tribunals.⁴ The powers have been principally exercised in the regulation of rates, requiring the rates to be reasonable in themselves, and in attempting to prevent discrimination between shippers of the same class of goods, either in charges or in terminal facilities.⁵ Carriers are not at lib-

railway company failing to so repair, and thereby obstructing travel, is indictable for maintaining a nuisance; and upon failure to abate the nuisance, the obstructions may be removed by order of the court.

¹ *State v. Cincinnati, W. & B. Ry. Co.*, (Ohio, 1890) 23 N. E. Rep., 928, holding that where a railroad company fixes a rate of freight per hundred pounds, for carrying petroleum oil in iron tank cars, substantially lower than its rate for transporting it in barrels in car-load lots, it is exercising "a franchise, privilege, or right in contravention of law," within the meaning of the fourth clause of section 6761, Ohio Rev. Stat.

² Beach on Railways, § 939.

³ *Minneapolis & St. L. R. Co. v. Board of Railroad Commissioners*, (Minn. 1890) 46 N. W. Rep. 559; *State v. Missouri Pac. Ry. Co.*, (Neb. 1890) 45 N. W. Rep. 785; Beach on Railways, §§ 939, 1020 *et seq.*

⁴ No appeal lies to the district court from an order of the railroad and warehouse commission appointed

under Minn. Laws 1887, ch. 10, relating to the mode of operating a railway so as to promote the safety and convenience of the public. Objections to such an order can only be made by way of defense to an action brought to enforce it. *Minneapolis & St. L. R. Co. v. Board of Railway Commissioners*, (Minn. 1890) 46 N. W. Rep. 559. *Cf.* *Spring Valley Water-Works v. City and County of San Francisco*, (Cal. 1890) 7 Ry. & Corp. L. J. 208.

⁵ Under a statute forbidding any discrimination in receiving and forwarding freight, and giving the board of transportation authority to investigate any alleged violations of the act, and make necessary orders, and enforce them, the board of transportation may institute an action, in a proper case, to require a railway company to furnish like facilities to erect an elevator at one of its stations to any person engaged, or who desires in good faith to engage, in the business of receiving, handling, and shipping grain over the railway.

erty to classify property as a basis of transportation rates and impose charges for its carriage with exclusive regard to their own interests, but they must respect the interests of those who may have occasion to employ their services, and conform their charges to the rules of relative equality and justice which the Interstate Commerce Act prescribes.¹ It is not the province of carriers to regulate business or to build up or destroy markets, but it is their duty to serve business interests equitably and impartially. The public is far more largely interested in miscellaneous shipments than in solid car-load shipments of one kind of traffic. While this condition exists the carriers have a duty to perform to make their service equitable and as reasonable as just compensation for their work will permit. All rates must be reasonable and just.²

State v. Missouri Pac. Ry. Co., (Neb. 1890) 45 N. W. Rep. 785, construing Neb. Act of July 1, 1887, and holding that while a railway company may impose reasonable conditions upon persons who erect, or are about to erect, elevators at stations on its line, the conditions and terms must be the same to all. But the refusal of a railway company to transport cattle for a shipper in cars of a special construction supplied by him, where it supplies cars for the same purpose, which it can use more profitably and conveniently by reason of their being likewise adapted for ordinary coal traffic when not in use for carrying cattle, is not an unjust discrimination under the Act of Congress to Regulate Interstate Commerce. (U. S. C. Ct. 1889) 6 Ry. & Corp. L. J. 364.

¹ *Thurber v. The Railroads*, (Inters. Com. Com. 1890) Ry. & Corp. L. J. 269, holding that classification of freight for transportation purposes, is in terms recognized by the Act to Regulate Commerce and is therefore lawful. It is also a valuable convenience both to shippers and carriers. A classification of freight designating different classes for car-load quantities and for less than car-load

quantities for transportation at a lower rate in car-loads than in less than car-loads is not in contravention of the Act to Regulate Commerce. The circumstances and conditions of the transportation in respect to the work done by the carrier and the revenue earned, are dissimilar, and may justify a reasonable difference in rate. The public interests are subserved by car-load classifications of property that on account of the volume transported to reach markets or supply the demands of trade throughout the country, legitimately or usually moves in such quantities. Cost of service is an important element in fixing transportation charges and entitled to fair consideration, but it is not alone controlling nor so applied in practice by carriers, and the value of the service to the property carried is an essential factor to be recognized in connection with other considerations. The public interests are not to be subordinated to those of carriers, and require proper regard for the value of the service in the apportionment of all charges upon traffic.

² "The Car-Load-Lot Cases," (In-

§ 834. (c) **Water companies.**—The franchise of laying pipes through city streets and selling water to the inhabitants thereof being in the nature of a public use, or natural monopoly, carries with it the duty to supply water to all impartially and at reasonable rates.¹ Accordingly a water company can not shut off the supply from any inhabitant without reasonable cause.² And an injunction may be issued to prevent it from cutting off its water supply, where the consumer has offered to pay in advance the proper amount for the use of the water during the year, and the company claims a higher rate than is truly due and exigible.³ The regulation of water-rates is frequently committed to municipal boards of super-

ters. Com. Com. 1890) 7 Ry. & Corp. L. J. 269, where the commission continued: "Differences ranging from forty per cent. to upwards of a hundred per cent. upon the same goods to the same destination, in substantially like quantities as well as in less, in the same kind of cars, and perhaps hauled in the same train, are manifestly neither reasonable nor just, and work undue prejudice and disadvantage to shippers and consignees of miscellaneous freight, both in full car-loads and in smaller quantities. The circumstance of many consignors to many consignees of a full car load to the same destination is too unimportant in the item of cost of handling to demand a difference in the rate. Fractional differences exist in all business, as they do under all laws imposing burdens, and in business are supposed to be equalized by average charges. For illustration, in the passenger service quantity is not considered, and passengers weighing three times as much, and with the full limit of baggage, are charged the same rate for the same journey as the lighter passengers without baggage; and a few passengers in a car pay no higher rate than the passengers in a full car, though the earnings of the two

cars and the cost of service per passenger differ widely. In the case of smaller shipments to many consignees at many destinations, there is such material difference in the cost of service, in the earnings of cars, and in car detention as to justify a higher charge. A reasonable amount of difference is difficult to adjust, but it should not be prohibitory upon the business, nor unjustly disproportionate."

¹ *Water-Works v. Schottler*, 110 U. S. 347, where Chief Justice Waite, who delivered the opinion in *Munn v. Illinois*, said: "That it is within the power of the government to regulate the prices at which water shall be sold by one who enjoys a virtual monopoly of the sale, we do not doubt. That question is settled by what was decided on full consideration in *Munn v. Illinois*, 94 U. S. 113." See also *Water-Works v. Bryant*, 52 Cal. 132; *Water-Works v. City and County of San Francisco*, 52 Cal. 111; *Water-Works v. Bartlett*, 63 Cal. 245.

² *McCrary v. Beaudry*, 67 Cal. 120.

³ *Ernst v. New Orleans Water-Works Co.*, (La. 1887) 2 So. Rep. 415; *Stewart v. New Orleans Water-Works Co.*, (La. 1887) 2 So. Rep. 416.

visors; and generally when the board of supervisors have fairly investigated and exercised their discretion in fixing the rates, the courts have no right to interfere on the sole ground that in the judgment of the court the rates thus fixed and determined are not reasonable.¹ But where these boards have arbitrarily, without investigation, and without any exercise of judgment or discretion, fixed these rates without any reference to what they should be, without reference either to the expense necessary to furnish the water or to what is a fair and reasonable compensation therefor, so as to render it impossible to furnish water without loss, and so low as to amount to a practical confiscation of the property invested in the business, it is within the jurisdiction of a court of equity to set aside their ordinance and direct the board to fix such rates as the constitution provided for.² The fact that there may be one price for the consumer who has a meter and a different price for one who has none, does not render the ordinance uncertain. The requirement that the party furnishing the water shall provide the means necessary for its measurement, so that the quantity furnished and to be paid for may be known, is not an unreasonable regulation. The expense of the meter could not be imposed on the consumer.³

§ 835. (d) **Gas companies.**— Gas companies, being engaged in a business of a public character, are charged with the performance of public duties. Their use of the streets, whose fee is held by the municipal corporation in trust for the benefit of the public, has been likened to the exercise of the power of eminent domain.⁴ Accordingly, a gas company is bound

¹ *Nesbitt v. Board*, L. R. 10 Q. B. 463; *Davis v. Mayor*, 1 Duer, 451, 497; *Water-Works v. Schottler*, 110 U. S. 347. *Cf. Railway Co. v. Dey*, 35 Fed. Rep. 866.

² *Spring Valley Water-Works v. City and County of San Francisco*, (Cal. 1890) 7 Ry. & Corp. L. J. 208.

³ *Spring Valley Water Works v. City and County of San Francisco*, (Cal. 1890) 7 Ry. & Corp. L. J. 208, citing to this point *Steamship Co. v. Jersey City*, 45 N. J. 246.

⁴ *Chicago Gas-Light & Coke Co. v. People's Gas-Light & Coke Co.*, 121 Ill. 530. In *Gibbs v. Baltimore Gas Co.*, 130 U. S. 396; s. c. 6 Ry. & Corp. L. J. 22, the Supreme Court of the United States, in an able opinion delivered by Mr. Chief Justice Fuller, uses these words: "These gas companies entered the streets of Baltimore under their charters in the exercise of the equivalent of the power of eminent domain, and are to be held as having assumed an ob-

to supply gas to premises with which its pipes are connected. It may, however, impose reasonable conditions, such as requiring a deposit to secure payment.¹ And a statute imposing a penalty on gas-light companies which for ten days after an application for gas neglect to supply it, is held to apply where, although gas has been furnished within the ten days, there is a neglect to give a continuous supply.² Where there is a probability that a gas company may have made an erroneous charge, notwithstanding the apparent registry of its meter, it will be restrained by injunction from cutting off the supply from the premises until the accuracy of the charge can be determined by a suit at law.³ Where a gas company agreed to furnish gas to plaintiff at his place of business, reserving to itself the right to refuse to furnish, or at any time to discontinue gas to any premises the owner or occupant of which should be indebted to the company for gas or fittings used upon the premises or elsewhere, it was held that the company could not shut off the gas on account of an unpaid debt previously contracted by plaintiff at a house from which he had moved before making this contract.⁴

§ 836. (e) Telegraph and telephone companies.—Telegraph and telephone companies are subjected to governmental control upon the same principles as railway carriers.⁵ A tel-

ligation to fulfill the public purposes to subserve which they were incorporated." Cf. "Gas Legislation," 43 L. T. 192.

¹ *Williams v. Mutual Gas Co.*, 52 Mich. 499; s. c. 50 Am. Rep. 266.

² *Meiers v. Metropolitan Gas-Light Co.*, 11 Daly, 119, construing N. Y. Laws of 1839, ch. 311, § 6.

³ *Sickles v. Manhattan Gas-Light Co.*, 66 How. Pr. 305, 314; s. c. 64 How. Pr. 33, holding also that the N. Y. Act of 1859 does not confer upon a gas company an unqualified right to shut off the gas in such a case.

⁴ *Lloyd v. Washington Gas-Light Co.*, 1 Mackey, (D. C.) 331.

⁵ See, generally: Notes and articles by Adelbert Hamilton, 24 Am. L. Reg. N. S. 573; by W. W. Thornton, 25 Am. L. Reg. 317, and in 23 Cent. L. J. 34; 10 Cent. L. J. 438; 59 Am. Rep. 172, 175; 44 Am. Rep. 241, 243; 38 Am. Rep. 587, 589. A telephone company is a common carrier, whose charges may be regulated by the legislature, and which may be required to furnish equal facilities to all. And it can not evade a statute limiting its charges, by failing to furnish the organized apparatus or combination of instruments commonly used. *Central Union Telephone Co. v. Bradbury*, 106 Ind. 1. Under Ind. Rev. Stat. 1881, § 4176,

egraph company can not by contract, evade a penal statutory liability for failure to transmit a message correctly.¹ Where a company has power to own and operate telephone lines, to erect poles along and across public roads and streets, and condemn private property for a right of way, it is charged with the duty of receiving and transmitting messages with impartiality and good faith, and is subject to public regulations, including the right of the State to fix and prescribe a maximum rate for telephone service; and this power may be delegated to municipal corporations.² These companies may not arbitrarily refuse their facilities to any person desiring them and offering to comply with their regulations; and *mandamus* will issue to compel them to do their duty.³

imposing a penalty on telegraph companies for failure to properly transmit messages "during the usual office hours," it was held that where a message was received in office hours and promptly transmitted to another office, where it was received after office hours, and so not delivered till noon of the next day, the company was not liable if the office hours at the last office were reasonable. *Western Union Telegraph Co. v. Harding*, 103 Ind. 505.

¹ *Western Union Tel. Co. v. Adams*, 87 Ind. 598; s. c. 44 Am. Rep. 776; *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429; s. c. 9 Am. Rep. 744; *Western Union Tel. Co. v. Meek*, 49 Ind. 53. *Texas Rev. Stat. art. 624*, declares that no corporation shall contract with a land-owner for the exclusive right to maintain a telegraph line on his land, and it was held that the prohibition applies to such an agreement between a railroad company and a telegraph company. *Western Union Telegraph Co. v. Baltimore & Ohio Telegraph Co.*, 22 Fed. Rep. 133.

² *City of St. Louis v. Bell Telephone Co.*, (1888) 96 Mo. 623; s. c. 9 Am. St. Rep. 370, notwithstanding

a clause in the incorporating act conferring upon the company power "to establish reasonable charges."

³ *State v. Nebraska Telephone Co.*, 17 Neb. 126; s. c. 52 Am. Rep. 404. *Ind. Act of April 8, 1885, §§ 2, 3*, provides that every telephone company with wires wholly or partly within the State, and engaged in a general telephone business, shall supply all applicants with telephone connections and facilities, without discrimination, and fixes a maximum rental. And it was held that a telephone company, doing a general business, must furnish any person within the local limits of its business, in any town or city, with a telephone and connections for his own use, and that it was no defense to say that the company did not rent telephones, but furnished such service by means of public stations only. *Central Union Tel. Co. v. State*, (Ind. 1890) 24 N. E. Rep. 215, following *Central Union Tel. Co. v. State*, (Ind. 1889) 19 N. E. Rep. 604. The defendant, a Connecticut telephone company, had purchased from a Massachusetts telephone company, owning the patent, the right to use its magnetic telephone system for a

§ 837. (f) **Transmitters of stock quotations.**—A board of trade which is an association of persons for their own convenience merely may decide among what outside persons its telegraphic reports may be distributed.¹ And an incorporated board of trade may exclude from its exchange, telegraph operators who seek to collect market reports for transmission.² But a corporation chartered for the purpose of transmitting stock quotations by telegraph, is a public corporation, and can not make any distinction in respect to persons who wish to partake of the privileges which it was created to furnish, nor refuse its privileges to one willing to pay for them.³

§ 838. **Annual reports.**—In New York all corporations are required to report annually the amount of their capital, the proportion actually paid in and the amount of existing debts. And non-compliance with the statute renders the directors personally liable jointly and severally for the corporate debts.⁴ There are similar statutes in other

certain period, on the condition that it should not permit telegraph companies to use the system unless they had purchased the right from the Massachusetts company. A statute of Connecticut provides that every telephone company shall impartially permit persons and corporations to transmit speech through its wires by its instruments. The plaintiff, a telegraph company in Connecticut, not having purchased the right, sued to compel the defendant to permit it to use the system; and it was held not maintainable. *American Rapid Telegraph Co. v. Connecticut Telephone Co.*, 49 Conn. 352; s. c. 44 Am. Rep. 237.

¹ *Marine Grain and Stock Exchange v. Western Union Telegraph Co.*, 22 Fed. Rep. 23. See Monographic Note by Adelbert Hamilton, 17 Fed. Rep. 828.

² *Metropolitan Grain & Stock Exchange v. Chicago Board of Trade*, 15 Fed. Rep. 847.

³ *Friedman v. Gold & Stock Telegraph Co.*, 32 Hun, 4.

⁴ N. Y. Laws of 1848, ch. 40, § 12, as amended by Laws of 1875, ch. 510. In an action against a director for the debt of a corporation, upon the ground of failure to file an annual report, it was not prejudicial error to admit the judgment roll of a judgment against the corporation for the same debt, for the purpose only of proving the costs in that action, which plaintiff claimed a right to recover, when the finding was against the claim. *Post-Express Printing Co. v. Coursey*, (1890) 10 N. Y. Supl. 497. A report which stated the amount of capital at \$50,000, the amount of capital paid in at \$50,000, "all paid cash, patent-rights, merchandise, machinery, accounts etc., necessary to the business," and further gave the existing indebtedness at \$38,500, was in compliance with the statute, no statement of the proportion paid in cash

States.¹ Non-compliance, however, is not a ground of forfeiture of charter.² The report, under the New York act, must be filed within twenty days "from" the 1st of January in each year, and it is held that this means "after" that date, so that a report published in the preceding year within twenty days before the 1st of January is of no avail, although made in good faith.³ But if before the time for filing a report, the object fails for which the corporation was organized, it need not be made.⁴

§ 839. Limits of the power to regulate.—It is not to be inferred that this power of limitation or regulation is itself without limit. The power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the State can not require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use, without just compensation or without due process of law.⁵ The legislature has unrestrained power over such corporations only as may be characterized as agents of the government.⁶ While private charters are protected under the rule in the Dartmouth College Case, private corporations are nevertheless subject like natural persons to those regulations which the State may prescribe for the good government of the community.⁷ The State, however, does not possess unrestricted power over private corporations not invested with political power nor created to be employed and partake in the administration of government; nor to control funds belonging to the State, nor to conduct transactions in which the State is interested.⁸ A court of equity has no power, either at common law, or

being required. *Whitaker v. Masterton*, (N. Y. 1887) 12 N. E. Rep. 604.

¹ *E. g.* Ind. Rev. Stat. 1881, § 3641.

² *State v. Brownstown & R. V. Gravel-Road Co.*, (Ind. 1889) 22 N. E. Rep. 316.

³ *Cincinnati Cooperage Co. v. O'Kieffe*, (N. Y. 1890) 24 N. E. Rep. 993.

⁴ *Kirkland v. Kille*, 99 N. Y. 390.

⁵ *Waite, C. J.* in *Stone v. Trust Co.*, 116 U. S. 331.

⁶ *Louisville v. President &c. of University*, 15 B. Mon. 642, holding that a university is not included.

⁷ *Gorman v. Pacific Railroad*, 26 Mo. 441.

⁸ *Louisville v. President &c. of University*, 15 B. Mon. 642.

under the Interstate Commerce Act, to compel a railroad company to enter into a contract with another company for a joint through rate or joint through routing of freight and passengers.¹ The common law imposes no obligation on railroad companies to enter into such contracts. "At common law a carrier is not bound to carry except on his own line; and we think it quite clear that if he contracts to go beyond, he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ."² Neither has the power been conferred as yet upon the Interstate Commerce Commission.³ "The regulation of matters of this kind is legislative in its character, not judicial. To what extent it must come, if it comes at all, from congress, and to what extent it may come from the States, are questions we do not now undertake to decide; but that it must come, when it does

¹ *Little Rock & M. R. Co. v. St. Louis, I. M. & S. Ry. Co.*, (U. S. C. Ct. 1890) 7 Ry. & Corp. L. J. 285.

² *Atchison, Topeka & Santa Fe R. Co. v. Denver & N. O. R. Co.*, 110 U. S. 667-680. Making contracts for parties "is not within the scope of judicial power." *Express Cases*, 117 U. S. 1-26. In the case last cited the court, speaking of the decree of the court below fixing and regulating the terms upon which the railroad company and the express company should do business, said: "In this way, as it seems to us, the court has made an arrangement for the business intercourse of these companies, such as in its opinion they ought to have made for themselves, and that we said in *Atchison, Topeka & Santa Fe Railroad Co. v. Denver & New Orleans Railroad Co.*, 110 U. S. 667, followed at this term in *Pulman's Palace Car Co. v. Missouri Pacific Railway Co.*, 115 U. S. 587, could not be done."

³ *Little Rock &c. R. Co. v. St. Louis &c. Ry. Co.*, (U. S. C. Ct. 1890) 7 Ry. & Corp. L. J. 285, 288, where the court said: "Has the jurisdiction

been conferred by the Act of Congress? Complainant maintains that it has by the third section of the Interstate Commerce Act. It would serve no useful purpose for the court to engage in an extended discussion of this question. It has been discussed and decided by the Interstate Commerce Commission in the *Little Rock & Memphis Railroad Co. v. East Tenn., V. & Ga. R. Co.* and the *St. Louis, I. M. & S. Ry. Co.*, 3 I. C. C. Rep. 1. In that case the present plaintiff was seeking the same relief that it seeks in this case and its petition was dismissed on the distinct ground that the Act of Congress does not, as does the present English statute, invest the Commission or the courts with the power to compel companies to enter into through routing and through rate contracts. The case of *Chicago & A. R. Co. v. Pennsylvania Co.*, 1 I. C. C. Rep. 9, and 360, and the opinion of Judge Jackson in *Kentucky & Indiana Bridge Co. v. Louisville & Nashville R. Co.*, 2 I. C. C. Rep. 351; s. c. 37 Fed. Rep. 567, are to the same effect."

come, from some source of legislative power, we do not doubt."¹

§ 840. *Quo warranto*.—Corporations are creatures of the law, and when they fail to perform duties which they were incorporated to perform, and in which the public have an interest, or do acts which are not authorized, or are forbidden them to do, the State may forfeit their franchises and dissolve them by an information in the nature of a *quo warranto*.² For the grant of corporate franchises is always subject to the implied condition that they will not be abused.³ In the earliest times the writ of *scire facias* was used by the government as a mode to ascertain and enforce the forfeiture of a corporate charter, in cases where there was a legal existing body, capable of acting, but who had abused their power. It would not lie in cases of mere *de facto* corporations. And it was necessary that the government be a party to the suit, for the judgment was that the parties be ousted and the franchises seized into the hands of the government.⁴ Later on the writ of *quo warranto* was invented, and issued to bring the defendant before the court to show by what authority he claimed an office or franchise, and was applicable alike to cases where the defendant never had a right, or where, having a right or franchise, he had forfeited it by neglect or abuse.⁵ An information in the nature of *quo warranto*, which has succeeded the writ of that name, was originally in form a criminal proceeding, to punish the usurpation of the franchise by a fine, as well as to seize the franchise. This information has in process of time become, in substance, a civil proceeding, to try the mere right to the franchise or office.⁶ There is now no other remedy, and

¹ Little Rock &c. R. Co. v. St. Louis &c. Ry. Co., (U. S. C. Ct. 1890) 7 Ry. & Corp. L. J. 285, quoting the Express Cases, 117 U. S. 1, 29. See to the same effect Kentucky & Indiana Bridge Co. v. Louisville & Nashville R. Co., 2 I. C. C. Rep. 351; s. c. 37 Fed. Rep. 567.

² People v. Insurance Co., 15 Johns. 358; People v. Railroad Co., 53 Cal. 694; Golden Rule v. People, 118 Ill.

492; People v. Dashaway Assoc., (1890) 84 Cal. 114; s. c. 8 Ry. & Corp. L. J. 236.

³ Insurance Co. v. Needles, 113 U. S. 574; People v. Dashaway Assoc., (1890) 84 Cal. 114; s. c. 8 Ry. & Corp. L. J. 236.

⁴ 2 Kent's Commentaries, 213.

⁵ 3 Blackstone's Commentaries, 262, 263.

⁶ Angell & Ames, Corp. § 756.

an application made by the attorney-general to a court of chancery for an injunction to restrain a company from usurping the franchise of banking, has been refused because there was a complete and adequate remedy at law by an information in the nature of a *quo warranto*.¹ The principle of forfeiture is that the franchise is a trust, and the terms of the charter are conditions of the trust; and if any one of the conditions of the trust be violated it will work a forfeiture of the charter. Cases of forfeiture are said to be divided into two great classes: (1) Cases of perversion, as where a corporation does an act inconsistent with the nature and destructive of the ends and purposes of the grant. In these cases, unless the perversion is such as to amount to an injury to the public who are interested in the franchise, it will not work a forfeiture. (2) Cases of usurpation, as where a corporation exercises a power which it has no right to exercise. In this last case the question of forfeiture is not dependent, as in the former, upon any interest or injury to the public.²

§ 841. The same subject continued.—An information in the nature of *quo warranto* to forfeit the charter of a corporation for perversion of its franchise may be brought by the people where the constitution of a State revives the writ of *quo warranto*.³ The action is properly brought in the name of the people, and against the corporations in their corporate names, in cases where they had, as corporations, usurped franchises not granted by their charters.⁴ And the corporation must be made a party in an action to restrain the usurpation of corporate franchises.⁵ For in its relation to the government, and when the acts or neglects of a corporation, in violation of its charter or of the general law, become the subject of public inquiry, with a view to the forfeiture of its charter, the wilful acts and neglects of its officers are regarded as the acts and neglects of the corporation, and render the

¹ *People v. Insurance Co.*, 15 Johns. 358. 84 Cal. 114; s. c. 8 Ry. & Corp. L. J. 236.

² *People v. Dashaway Assoc.*, (1890) 84 Cal. 114; s. c. 8 Ry. & Corp. L. J. 236. ⁴ *People v. Bank*, 6 Cow. 196, 211, 217; *People v. Trustees*, 5 Wend. 211.

³ *People v. Dashaway Assoc.*, (1890) ⁵ *People v. Flint*, 64 Cal. 49.

corporation liable to a judgment or decree of dissolution.¹ This reasoning proceeds upon the theory that the corporation is cognizant of and approves of the acts of its agents; and where it is made to appear that the agent has departed from his duties, as prescribed by the corporation, or violated his instructions in the performance of the acts complained of and relied upon as basis for forfeiture, no such forfeiture will be declared.² It was a peculiarity both of the writ and of the information, that the ordinary rule of pleading was reversed and the defendant was required to show its right or the judgment went against it. The practice has, however, become quite general in this country for the information to set forth the facts relied upon to show the intrusion, misuser, or non-user complained of. In information of *quo warranto* there were two forms of judgment. When against an officer or individual the judgment was ouster; when against a corporation by its corporate name the judgment was ouster and seizure. In the first case, there being no franchise forfeited, there is none to seize; in the second case there is; consequently the franchise is seized.³ But there may be a judgment of ouster of a particular franchise and not of the whole charter.⁴ The forfeiture of a charter of a corporation can not be maintained on an averment in the nature of a *quo warranto* that the corporation was formed to "promote the cause of temperance," and that it has abused its trust and misappropriated its funds, as it can not be said that the perversion of the fund from so vague an object as "temperance" is a public injury.⁵ In the absence of any action against the shareholders of a corporation on the part of the State for a want of legal organization by them, no action on this account will lie in behalf of parties dealing with the corporation, if the shareholders appear to have acted in the *bona fide* belief that they were duly incorporated.⁶ The civil action of *quo warranto*

¹ Angell & Ames, Corp. § 310; Life Ins. Co. v. Mechanics' Ins. Co., 7 Wend. 35; Bank Commissioners v. Bank of Buffalo, 6 Paige, 497; Ward v. Insurance Co., 7 Paige, 294.

² State v. Commercial Bank, 6 Smedes & M. 237.

³ 2 Kent's Commentaries, 312, and note.

⁴ People v. Railroad Co., 15 Wend. 113.

⁵ People v. Dashaway Assoc., (1890) 84 Cal. 114.

⁶ Gartside Coal Co. v. Maxwell, 22 Fed. Rep. 197.

may be brought against a foreign corporation, which assumes to transact in Ohio the business of life insurance on the assessment plan, without complying with the conditions imposed by law on the transaction of that business, for the purpose of ousting it from the exercise of its franchises in the State.¹ And a proceeding by a State to forfeit a franchise can not be removed to the federal courts on the ground that it impairs the obligations of a contract; the prohibition of the constitution being that "no State shall pass any law" impairing the obligation of contracts.² Neither does a proceeding to exclude a bridge company from the use of a franchise to operate railroad tracks in a public street raise a federal question, although the tracks lead to its bridge, built under acts of congress authorizing the construction of a railroad bridge over the Ohio river, and declaring that it shall be a lawful structure, and shall be recognized and known as a post-route, as those acts do not attempt to give the right to the use of the street as an approach.³

§ 842. Whether corporations may be partners.— One firm may be a partner with another firm;⁴ and "there is no general principle of law which prevents a corporation from being a partner with another corporation or with ordinary individuals, except the principle that a corporation can not lawfully employ its funds for purposes not authorized by its constitution."⁵

¹ *State v. Western &c. Soc.*, (Ohio, 1890) 24 N. E. Rep. 392.

² *Commonwealth v. Louisville &c. Co.*, (1890) 42 Fed. Rep. 241; s. c. 8 Ry. & Corp. L. J. 106. Cf. § 20, *supra*.

³ *Commonwealth v. Louisville &c. Co.*, (1890) 42 Fed. Rep. 241; s. c. 8 Ry. & Corp. L. J. 106.

⁴ *In re Hamilton*, 1 Fed. Rep. 800; *In re Warner*, 7 Bankr. Reg. 47; *Smith v. Wright*, 5 Sandf. 113; *Raymond v. Putnam*, 44 N. H. 160; *Bullock v. Hubbard*, 23 Cal. 495; *Mullins v. Miller*, 1 Lower Can. J. 121; *Mellon v. Craig*, 3 Ontario R. Ch. Div. 546.

⁵ *Lindley on Partnership*, *78, citing *Gill v. Manchester, S. &c. Ry.*

Co., L. R. 8 Q. B. 186, as to one company being the agent of another, if not its partner. See generally as to corporations entering into partnership: 3 Central L. Jour. (1876) 668-9; 15 Fed. Rep. Note of Cases, (1883) 667-674; 71 Amer. Dec. (1886) 681; 8 So. West. Rep. (1888) 396; McKinney's Note of Cases, 20 Amer. & Eng. Corp. Cas. (1888) 485-6; 3 No. of Cases, (1888) 58, 59; 4 No. of Cases, (1889) 1-3; cited by W. H. Winters in "The Bibliography of Commercial Trusts," (1890) 7 Ry. & Corp. L. J. 236. See also notes and articles upon the consolidation of corporations: Elliott (C. B.), 17 West. Jur. (1883) 345-359; Elliott

"Having regard, however, to this principle, it may be considered as *prima facie ultra vires* for an incorporated company to enter into partnership with other persons."¹ But there are cases in which partnership agreements between corporations or between a corporation and other persons have been sustained and enforced. In an early case in Georgia, in holding that a contract respecting the use of machinery, which the parties styled a "lease," was in fact a partnership, on the ground that the so-called "rental" was to be paid *only* out of the net profits of the business and was not to exceed a certain proportion of them, the court below said: "The fact that the plaintiff is a corporation and the Dalton City Company is also a corporation, makes no difference in the legal principles which govern the case, for a corporation may be a *machinist* in the eye of the law as well as an individual." And on appeal this proposition was not denied.² In a later well argued case in Connecticut, it appeared that the Stevens Company, a partnership engaged in the manufacture of toys, was a member of a firm known as the American Toy Company, engaged in the wholesale and retail toy business. The Stevens partnership, being technically dissolved by the death of one of its members, the heirs and surviving partners applied to the legislature for a charter of incorporation, on the ground that the business was

(C. B.), 17 Centr. L. Jour. (1883) 382-3; 6 N. J. Law Jour. (1883) 360-3; Freeman (A. C.), 79 Am. Dec. (1886) 422-8; Desty (Robt.), 2 Lawy. Rep. Ann. (1889) 726-8. "Amalgamation of Companies:" 43 London Law Times, (1867) 209-210; and 17 Solicitor's Jour. (1873) 362-364.

¹ Lindley on Partnership, *79, 80, citing the American cases Sharon Coal Co. v. Fulton Bank, 7 Wend. 412; Catskill Bank v. Gray, 14 Barb. 479; and as to holding out, Holmes v. Old Colony R. Co., 5 Gray, 58. Whittenton Mills v. Upton, 10 Gray, 582. In this case a person bought the machinery, tools and stock of a foundry which he hired. The foundry had previously furnished machinery to a manufacturing cor-

poration. The lessor of the foundry and the corporation then made an agreement by which the corporation was to advance money for the machinery, tools, stock and rent, the lessor was to have a salary, and the profits of the business done by him was to be divided for five years, subsequently extended three years. In the purchase of machinery for the corporation the parties dealt as strangers. It was held that the corporation could not put its business beyond its control, enter into any business foreign to that for which it was created (cotton manufacturing), nor enter into partnership for that purpose.

² Dalton City Co. v. Dalton Manuf. Co., (1852) 33 Ga. 243.

prosperous and any break in its management would work injuriously to all concerned. The legislature granted a charter reciting the substance of the petition in the preamble of the act; and it was decided in an elaborate opinion, that the act authorized the corporation to continue the business as it was then conducted, and to continue the partnership relation with the toy company.¹ And where nothing in an act of incorporation specified the business to be done, nor did anything in the corporate name suggest it, and all the stock was held by a single stockholder, the corporation having entered into partnership with a firm, to be terminated at will by the corporation, the court held that this was not *ultra vires* on its part.² The results of partnership arrangements between corporations and individuals have been subjected to the rules governing partnerships, and their contracts enforced even where the agreement has not been upheld.³ Accordingly,

¹ *Butler v. American Toy Co.*, (1878) 46 Conn. 136.

² *Allen v. Woonsocket Co.*, (1876) 11 R. I. 288. It was here, said: "Where a corporation is created for special purposes, there is no doubt that it must be confined in its operations to those purposes. But in the construction of its powers it may be sometimes very important to consider whether the corporation is bound to show that the act done is within its granted powers, or whether the contestant is bound to show that it is beyond them. . . . And the general rule may be stated to be that it lies on those who impeach the contract to show that it is avoided. The contrary rule would probably produce a great deal of litigation in this State. It is believed that there are many charters of corporations doing a very large business where in the charter itself no purpose whatever is specified (although in one, the Lonsdale, it is described in the title of the act, and there only as a manufacturing corporation), and a still greater number where the intended business

can only be inferred from the name. In such cases the fact that the persons were incorporated, and the fact that the legislature and the corporators have acquiesced in the doing of a particular business, or in a continued course of dealing, might be entitled to weight. If the partnership had been for a definite period, it might well be argued that the respondent had no right to make such a contract. But it was a mere partnership at will, terminable at any moment by either party. The respondent, therefore, did no more part with the control of the business than if it had employed the partners as agents, and its right to do that can not very well be denied."

³ Where a corporation entered into regular articles of copartnership with an individual, and goods were sold in good faith relying upon the liability of both the corporation and the individual, it was held not necessary to establish a valid copartnership between the defendants to create the liability claimed against them. A corporation may, in furtherance of

where a corporation and an individual have assumed to enter into partnership and jointly transact business together, they may, by reason of their joint interest, recover upon obligations made to them in their partnership name irrespective of their partnership rights and duties as between themselves or the capacity of the association to execute the powers incident to a partnership.¹ While a corporation and individuals who have gone into partnership to run a ferry do not constitute a partnership, they may be partners in the profits of the ferry, being tenants in common thereof and as such entitled to share in its earnings.² In the case of an agreement between two railroad companies for the interchange of traffic, with through tickets and through rates, where one of the companies took a shipment for a station on the other's road, it was assumed that if the agreement was not a partnership it was sufficient to constitute one company the agent of the other to make the contract of carriage.³

the object of its creation, contract with an individual, although the effect of the contract may be to impose upon the company the liability of a partner. And as to third persons the liability of a partner is frequently imposed, although it was not the intention of the party sought to be charged to become one, and even though a partnership could not have been made. *Cleveland &c. Co. v. Courier &c. Co.*, (1887) 67 Mich. 152, citing *Manhattan &c. Co. v. Sears*, 45 N. Y. 799; *Leggett v. Hyde*, 58 N. Y. 272; *Raft Co. v. Roach*, 97 N. Y. 378. Where a company leased its iron works to an individual for five years, reserving a part of the profits for rent, as the company had an interest in the profits as such, it was held liable as a partner, and the contract was sustained. *Catskill Bank v. Gray*, 14 Barb. 479. A bank which could only take ten per cent. and an insurance company which could take twelve per cent. on loans, were composed of the same stockholders and

officers and used the same room and vault. The profits of the bank on exchange and of the insurance company on loans were divided between the two. On suit against the bank as a partner on account of depreciation of bills deposited with the insurance company, it was said the two corporations could not form a partnership, but could make joint contracts, and a verdict for the plaintiff was affirmed. *Marine Bank v. Ogden*, 29 Ill. 248.

¹ *French v. Donohue*, (1882) 29 Minn. 111.

² *Hackett v. Multnomah Ry. Co.*, (1885) 12 Oregon, 130.

³ *Gill v. Manchester &c. R. Co.*, (1873) L. R. 8 Q. B. 186. A corporation was organized to acquire, develop and sell lands and water rights, and being a mere agency for more conveniently carrying out the agreements between the parties organizing it, was held to constitute a partnership, and the entire capital stock of the corporation was treated as

§ 843. The same subject continued.—The weight of authority, however, is contrary to the existence of any implied power in corporations to enter into partnership agreements with other companies or individuals;¹ the reason frequently assigned being that it is contrary to public policy that corporations should be bound except by the acts of their regularly appointed directors and officers, while as members of partnerships they could be bound by the acts of the other members of the firm.² Not only, it is said, does the partnership relation interfere with the management of the corporation by its regularly appointed officers, but it is also an impairment of the authority of its shareholders themselves and involves the company in new responsibilities through agents over whom they have no control.³ And if two companies contract for a permanent amalgamation, it is equivalent to the creation of a new corporation without the consent of the sovereign and therefore *ultra vires*.⁴

partnership assets. *Sharb v. Beaudry* (1880) 56 Cal. 446.

¹ *Central R. & C. Co. v. Smith*, 76 Ala. 572; s. c. 52 Am. Rep. 353; *Mallory v. Hanaur Oil-Works*, (1888) 86 Tenn. 598; *People v. North River Sugar Ref. Co.*, (1890) 121 N. Y. 582; *Whittenton Mills v. Upton*, 10 Gray, 582; *New York & C. Canal Co. v. Fulton Bank*, 7 Wend. 412; *Charlton v. New Castle & C. Ry. Co.*, 5 Jur. (N. S.) 1097; *Angell & Ames on Corporations*, § 272; 1 *Morawetz on Priv. Corporations*, § 421; *Green's Brice Ultra Vires*, 334 *et seq.*; *Commonwealth v. Smith*, 10 Allen, 448; *Hanson v. Paige*, 3 Gray, 239; *Bissell v. Michigan Southern & N. I. R. Co.*, 22 N. Y. 258; *Catskill Bank v. Gray*, 14 Barb. 471; *Catskill Bank v. Hooper*, 5 Gray, 574; *Marine Bank v. Ogden*, 29 Ill. 248; *Conkling v. Washington Univ.*, 2 Md. Ch. 497; *Gunn v. Central R. & C. Co.*, 74 Ga. 509; *Jones v. Parker*, 29 N. H. 31; *Van Keuren v. Trenton Co.*, 13 N. J. Eq. 302; *French v. Donohue*, 29 Minn. 111; *Lamoine Val. & C. R. Co. v. Bixby*,

55 Vt. 235; *Ontario Salt Co. v. Merchants' Salt Co.*, 18 Ontario Ch. 540. Accordingly, a railroad can not form a partnership with a private person unless especially authorized by its charter. *Ledgister v. Central Line Steamers*, 75 Ga. 567; *Gunn v. Central R. & C. Co.*, 74 Ga. 509.

² *Hackett v. Multnomah Ry. Co.*, (1885) 12 Oregon, 129.

³ *Whittenton Mills v. Upton*, 10 Gray, 582; s. c. 71 Am. Dec. 681; *Mallory v. Hanaur Oil-Works*, (1888) 86 Tenn. 598.

⁴ *Charlton v. New Castle & C. R. Co.*, 5 Jur. N. S. 1097. The projectors of a canal lying in two States obtained separate charters for each portion, each corporation having the same officers, and by a by-law the stock was consolidated. The court said in the case that although it was not necessary to decide the point whether corporations might consolidate or form a partnership, general principles were against such powers. *New York & C. Co. v. Fulton Bank*, 7 Wend. 412.

§ 844. **Pools.**—It is said that an arrangement by which two competing systems of railroads agree to divide their earnings for traffic between given points, for which they were previously competitors, is against public interest, contrary to public policy, and can not be judicially enforced. But in disposing of these cases, courts will not decree the nullity of the contract sought to be enforced. They simply abstain from dealing with it, or adjudicating any rights arising thereunder, or giving their aid for the division of profits, although ascertained, between the parties thereto.¹ So also where the proprietors of several lines of canal boats agreed to establish fixed rates of freight and passage for a certain season, and to divide the net earnings among themselves according to fixed rules, the attempt of one of the contracting parties to enforce the agreement against a recalcitrant member of the combination

¹ *Texas & Pacific Ry. Co. v. Southern Pacific Ry. Co.*, (La. 1889) 7 Ry. & Corp. L. J. 184, where the court said "We have been at great pains, and have devoted long and tedious labor, to examine all the authorities, consisting mainly of decisions rendered on the point by courts of last resort in this country, which were submitted to us by counsel in the case, and we reach the conclusion that American jurisprudence has firmly settled the doctrine that all contracts which have a palpable tendency to stifle competition, either in the market value of commodities or in the carriage or transportation of such commodities, are contrary to public policy, and are therefore incapable of conferring upon the parties thereto any rights which a court of justice can recognize or enforce." The doctrine finds additional support and sanction from the following authorities: *Gibbs v. Gas Co.*, 130 U. S. 408, in which the court said: "Hence, while it is justly urged that those rules which say that a given contract is against public policy should not be arbitrarily extended

so as to interfere with freedom of contract, . . . yet, in the instance of business of such character that it presumably can not be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy." See, also, *Iron Co. v. Extension Co.*, 129 U. S. 644; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *Arnot v. Pittston & E. Coal Co.*, 68 N. Y. 558; *Craft v. McConoughy*, 79 Ill. 346; *Morrill v. Railroad Co.*, 55 N. H. 537; *Jackson v. McLean*, 36 Fed. Rep. 213; *Lumber Co. v. Hayes*, 18 Pac. Rep. 392; *Hamilton's Note to Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co.*, (1883) 15 Fed. Rep. 667. In *Cleveland & C. Ry. Co. v. Closer*, (Ind. 1890) 43 Alb. L. J. 209, the court said: "We are not required to decide, nor do we decide that combinations fair to the public, untainted by any sinister design, and formed solely to prevent the destruction of business by unregulated competition, may not be valid."

was discountenanced.¹ But pooling agreements between railways have been sustained as not being partnerships;² and the better rule is that a contract between rival and competing railway companies made for the purpose of preventing competition, but not for the purpose of raising the prices of transportation above a reasonable standard, is not void as against public policy.³ So also it is held that an agreement entered into by a telegraph company to divide earnings and expenses with another company, is neither *ultra vires* nor against public policy, especially where approved by a majority of directors and stockholders.⁴ In England, if the public interests are not prejudiced thereby, companies having the same termini may, for the purpose of avoiding competition, validly form a pool and distribute traffic and earnings among themselves proportionally.⁵ Whatever may be the policy of the States upon

¹ Hooker v. Vandewater, 4 Denio, 349.

² Briggs v. Vanderbilt, 19 Barb. 222; Pratt v. Ogdensburg & L. C. R. Co., 102 Mass. 557; Hotsprings R. Co. v. Trippe, 42 Ark. 465; s. c. 48 Am. Rep. 65; Converse v. Norwich & N. Y. Trans. Co., 33 Conn. 166.

³ Manchester & L. R. Co. v. Concord R. Co., (N. H. 1890) 20 Atlan. Rep. 383. Cf. Wood's Ry. Law, 590-600; Morrill v. Boston & C. R. Co., 55 N. H. 531, apparently *contra*, was decided under a statute prohibiting pools. In a "Letter in Favor of the Legalization of Pools," addressed to Hon. S. M. Cullum, Chairman of the Federal Senate Committee on Interstate Commerce, by George B. Blanchard, Chairman of the Central Traffic Association, (1890) 8 Ry. & Corp. L. J. 1, the writer says: "The unintelligent conception of pools was that they partook of the nature of combinations of chance or pools in stocks. There was also a mistaken public idea that pools sought to maintain burdensome rates in order to pay excessive dividends upon watered

stock, increased issues of bonds etc. Rates are beyond such influences. It is more or less true of all sections of the country that there is little, if any, relation between a railway's stocks and bonds and its charges for transportation. The prohibition of pooling was therefore the mandate of public misconception and three years' operation of the law has largely dispelled it."

⁴ Benedict v. Western Union Telegraph Co., 9 Abb. N. Cas. 14.

⁵ Beach on Railways, § 528, citing Hare v. London & C. Ry. Co., 2 Johns. & H. 80. See the judgment in that case, where Shrewsbury & C. Ry. Co. v. London & C. Ry. Co., 17 Q. B. 652; 2 Macn. & G. 324; s. c. 6 H. L. 113, is discussed. See also Lancaster & C. Ry. Co. v. North Western Ry. Co., 2 Kay & J. 293; Browne & Theobald's Ry. Law, 288. But the agreement by which the pool is formed has been said to be illegal, if it extend to future traffic upon a line of railway which a company may hereafter be empowered to construct. Browne & Theobald's Ry. Law, 288, citing

this subject, it may well be doubted whether congress has any power to legislate against the pooling of freights or earnings.¹

§ 845. Combinations in restraint of trade.—The cases upon this subject seem naturally to separate into two classes. In one the question is whether the contracting party has, to a greater extent than fairly required for the protection of his private interests, disabled himself from carrying on his trade or business, and so not only deprived society of a useful member, but created a strong probability of adding to its burdens by reason of idleness or crime. The public in this class of cases is affected only indirectly through the individual contracting.² In the other class, the question arising upon agreements creating combinations of persons engaged or interested in the same kind of business, is whether their object and effect are to directly affect the public “by preventing competition and

Midland Ry. Co. v. London &c. Ry. Co., 2 Eq. 524.

¹ An Opinion by Hon. Clarence A. Seward, (1890) 7 Ry. & Corp. L. J. 261, in which he reaches the following conclusions: “1. When an act of incorporation confers upon a common carrier the right to fix and determine its rates, the question of the reasonableness or unreasonableness of such rates when so determined, is a question of pure law, and congress has not lawful power, by prescribing or prohibiting amounts, to withdraw the question from the judgment of the courts. 2. If the courts adjudge a given rate to be reasonable, congress has not lawful power to nullify such decision by either anticipatory or subsequent legislation declaring the charging of such a rate to be a crime. 3. If the right to fix and determine reasonable rates be a vested right and the property of the carrier, congress has not lawful power to impair such right or to destroy such property, unless by due process of law, and upon securing compensation for the

injury. 4. If the shipper does not otherwise direct on the shipment of his goods, different and competing carriers may lawfully agree, and as the agent of the shipper, to divide the same for transportation between themselves as they may elect, and congress can not properly interfere with their so doing. 5. Moneys paid to a common carrier in satisfaction of his charges are the absolute property of the carrier, and congress can not lawfully undertake to control the disposition to be made thereof.” Cf. The Interstate Railway Association and the Illinois Central Railroad Company—Mr. Seward’s Opinion, 5 Ry. & Corp. L. J. 213.

² Hoffman v. Brooks, 11 Week. L. Bul. 258, citing Lange v. Werk, 2 Ohio St. 519; Thomas v. Wiley, 3 Ohio St. 225. Cf. Anderson v. Jett, (1889) 11 Ky. L. Rep. 570. See generally upon monopolies, notes and articles in 3 Am. L. J. N. S. 283; by Robert Desty in 11 Fed. Rep. 632; 8 West. Jur. 511; by A. T. Harper in 1 Quart. J. Econ. 28.

enhancing prices," or "by exposing it to the evils of monopoly."¹ The law, as well said by Jessel, M. R., will not lightly interfere with the citizen's liberty to contract as he will, but the interests of the public have led to unquestionable limitations of such liberty.² In the first class of cases just named, the interest of the public and those of the party are to a great extent the same. Both forbid any restriction of his earning power without an equivalent, and this is the reason why only a partial restriction is permitted, and that only for a valuable consideration. In the second class of cases, the immediate interests of the public and those of the contracting parties are in conflict. The former desire lower, the latter higher prices. Any prevention of competition injures the public in this regard. But when competition becomes so great that those engaged in a business can not carry it on without loss, the public becomes exposed to the same danger as in the first class. The law, therefore, applies an analogous rule. Those engaged in any trade or business may, to such limited extent as may be fairly necessary to protect their interests, enter into agreements which will result in diminishing competition and so increasing prices. Just the extent to which this may be done, the courts have been careful not to define, just as they have refused to set monuments along the line between fairness and fraud.³ The presumption is always against the validity of these agreements, and certainly where they include all those engaged in any business in a large city or district, are unlimited in duration, and are manifestly intended, by the surrender of individual discretion, by the arbitrary fixing of prices, or by any of the methods of which the hope of gain makes human ingenuity so fruitful, to strangle competition outright and breed monopolies, the law, while it may not punish, will not enforce them.⁴ This is the sense in which nearly

¹ *Alger v. Thacker*, 19 Pick. 51.

Crawford v. Wick, 18 Ohio St. 190;

² *In Printing Co. v. Lamson*, L. R. 19 Eq. 465.

McBirnie v. White Lead Company, 9 Week. Law Bull. 310; *Morris Run*

³ *Hoffman v. Brooks*, 11 Week. L. Bul. 258.

Coal Co. v. Barclay Coal Co., 68 Pa. St. 173; *Arnot v. Pittston & E.*

⁴ *Hoffman v. Brooks*, 11 Week. L. Bul. 258, citing *Central Ohio Salt Company v. Guthrie*, 35 Ohio St. 666; *Grosselli v. Loudon*, 11 Ohio St. 349;

Coal Co., 68 N. Y. 558; *Craft v. McConoughy*, 79 Ill. 346; *Hilton v. Eckersley*, 6 E. & B. 47; *Stanton v. Allen*, 5 Den. 434.

all of those contracts between corporations in restraint of trade which are regarded as contrary to public policy, are said to be "illegal."¹ But even in this sense, it is not every combination among corporations that is illegal;² neither is every combination for the purpose of obviating the evils of competition to be regarded as contrary to public policy.³ Thus an agreement by a steam-ship company to pay a certain sum monthly to the owner of a competing line in consideration of his discontinuing running his vessels over that route, and agreeing not to sell or charter his vessels for use on it, nor to be in any way interested in steam-ships running over it, is not *ultra vires* as a contract in restraint of trade.⁴ So an agreement between railway companies for the division of territory, to obviate the evils of parallel construction of branch lines, has been considered by the court upon the question at issue between the parties without deciding upon questions of public policy.⁵ And a like silence was preserved by the federal cir-

¹ In *Craft v. McConoughy*, 79 Ill. 346, the suit was a bill for an accounting as to profits, and the court held the agreement to be against public policy and void and refused to lend its aid to either party. Cf. "Religious Restraints of Trade," by Irving Browne, 9 Alb. L. J. 249.

² *Leslie v. Lorillard*, (1888) 110 N. Y. 519.

³ *Leslie v. Lorillard*, (1888) 110 N. Y. 519.

⁴ *Leslie v. Lorillard*, (1888) 110 N. Y. 519. In this case the complaint alleged that one of the defendants, for the purpose of extorting money, threatened to have the company of which he was president run steam-ships in opposition to the Old Dominion Co., and thereby induced the latter to agree to make him monthly payments in consideration of an agreement to withdraw the opposition; that the Old Dominion Co. had been succeeded by a new company, of which plaintiff was a stockholder, and that this company had made a new contract modifying the former

one; that plaintiff has requested the directors of his company to pay no more money under it and to bring an action for its cancellation, which they have refused to do. But the court held that, as the complaint does not allege any fraud to which the officers of the Old Dominion Co. were parties, nor any deception or collusion as to the second contract, it does not show any right in plaintiff to sue for cancellation.

⁵ *Ives v. Smith*, (1890) 8 N. Y. Supl. 46. In this case two railroad companies entered into a contract by which certain territory was preserved to each, in which it should prosecute the work of extending its branch lines. After the directors of one of the contracting companies had passed resolutions to construct branch lines in violation of the contract, a meeting of the stockholders passed a resolution ratifying all the acts of the directors during a period covering the dates of the resolutions referred to, but it did not appear that those resolutions were read at

cuit court in a modern case, holding that mere disuse of a manufacturing plant under an agreement with other manufacturers to restrict production, although attended with the decay and dilapidation inseparable from disuse, is not such destruction or waste as to entitle a mortgagee to ask for a receiver.¹ The reason for the arrangement with the other company, as stated in the case, was that the latter had such facilities that it could produce the manufactured article at a cheaper cost; and it was claimed that it was better for the defendant to pay what it did for thus furnishing¹ its proportion than to furnish it from its own mills. "The defendant's mills and works," said the court, "have therefore remained idle, and have suffered from the decay and dilapidation incident to all such works when disused. The *prima facie* showing of gross neglect and despoiling of the property, made in support of the motion, is fairly refuted by the answer of the defendant and the affidavits of others supporting the answer, and the result of all the evidence is that no such destruction or waste of the property as would on that account warrant the appointment of a receiver is shown. To justify such an appointment the waste must be serious, and the danger of destruction or impairment of the security imminent."² Although a combination be illegal, a corporation may be estopped from setting up its illegality as against a receiver appointed to take charge of the property of the combination.³ So a company having received the proceeds of sale of its property to a competitor, who bought to stifle competition, has been held to be estopped from pleading want of authority in its executive committee to enter into the contract.⁴

§ 846. Reasonable restraint of trade.—"The tendency of recent adjudications is marked in the direction of relaxing the

the meeting, or the attention of the stockholders called to them, and there was evidence that some of the assenting stockholders were misled. The court held that there was no such ratification of the directors' resolutions as would preclude the stockholders from insisting that the contract be performed.

¹ Union Mutual Ins. Co. v. Conti-

mental Ins. Co., (1889) 37 Fed. Rep. 286.

² Union Mutual L. Ins. Co. v. Union Mills Plaster Co., (1889) 37 Fed. Rep. 286, 290, 291.

³ Pittsburgh Carbon Co. v. McMillin, (1889) 6 N. Y. Supl. 433.

⁴ Metropolitan Tel. & T. Co. v. Domestic Tel. & T. Co., (N. J. 1888) 14 Atlan. Rep. 907.

rigor of the doctrine that all contracts in general restraint of trade are void, irrespective of special circumstances. Indeed, it has of late been denied that a hard and fast rule of that kind has ever been the law of England.¹ When the restraint is general, but at the same time is co-extensive only with the interest to be protected and with the benefit meant to be conferred, there seems to be no good reason why, as between the parties, the contract is not as reasonable as when the interest is partial, and there is a corresponding partial restraint. And is there any real public interest which necessarily condemns the one and not the other? It is an encouragement to industry and to enterprise in building up a trade, that a man shall be allowed to sell the good will of the business and the fruits of his industry upon the best terms he can obtain. If his business extends over a continent, does public policy forbid his accompanying the sale with a stipulation for restraint co-extensive with the business which he sells?"² Mr. Justice

¹ *Match Co. v. Roeber*, (1887) 106 N. Y. 473, citing *Hitchcock v. Coker*, 6 Adol. & E. 438, where Chief Justice Tindal said: "We agree in the general principle adopted by the court that, where a restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it must be therefore void." "That passage was adopted by Lord Wensleydale, when a baron of the court of exchequer, in delivering judgment in *Ward v. Byrne*, 5 Mees. & W. 548, 561, and therefore the rule so expressed is the authority of the courts of Queen's Bench, Exchequer, and Exchequer Chamber. If, therefore, the extent of the restraint is not greater than can possibly be required for the protection of the plaintiff, it is not unreasonable. . . . But then it is said that over and above the rule that the contract shall be

reasonable there exists another rule, namely, that the contract shall be limited as to space, and that this contract, being in its terms unlimited as to space, and therefore extending to the whole of England and Wales, must be void. Now, in the first place, let me consider whether such a rule would be reasonable. There are many trades which are carried on all over the kingdom, which by their very nature are extensive and widely diffused. There are others which from their nature and necessities are local." *Match Co. v. Roeber*, 106 N. Y. 473.

² *Match Co. v. Roeber*, (1887) 106 N. Y. 473. In this case the defendant, who was a manufacturer of friction matches in the State of New York, with a large business throughout the United States and territories, sold his business and good will to the complainant corporation, with a covenant that he would not at any time within ninety-nine years engage in the manufacture or sale of

Bradley, speaking upon this point, has said: "It is a well-settled rule of law that an agreement in general restraint of trade is illegal and void; but an agreement which operates merely in partial restraint of trade is good, provided it be not unreasonable, and there be a consideration to support it. In order that it may not be unreasonable, the restraint imposed must not be larger than is required for the necessary protection of the party with whom the contract is made. . . . This country is substantially one country, especially in all matters of trade and business; and it is manifest that cases may arise in which it would involve too narrow a view of the subject to condemn as invalid a contract not to carry on a particular business within a particular State."¹ Accordingly in a recent case a contract between a manufacturing corporation, whose business extends throughout the United States and Canada, and one of its traveling salesmen, who has been in its employ for several-years, whereby he agrees not to enter the service of any business competitor of the corporation for three years after leaving its service, has been upheld as valid.²

§ 847. "Trusts"—The Sugar Trust.—The Sugar Trust is a combination of the sugar refineries of America, under the name of the Sugar Refineries Company. Those that were conducted by partnerships took corporate form for the purpose of entering into the combination. The shareholders surrendered their stock to trustees, and "trust certificates" were issued to the corporations in proportion to the value of their plants, which were redistributed among the former shareholders.³ The trustees receive the profits from every plant, and

friction matches, except as an employee of complainant, within any of the States or territories of the United States except Nevada and Montana. He subsequently entered into the employment of a rival company to manufacture matches in the State of New Jersey, and on suit being brought by the complainant to obtain an injunction restraining his employment with a competitor, it was urged, among other things, that the covenant was void as

against public policy because it was in restraint of trade. The injunction, however, was awarded.

¹ *Navigation Co. v. Winsor*, 20 Wall. 64.

² *Carter v. Alling*, (U. S. C. Ct. 1890) 8 Ry. & Corp. L. J. 428, citing and reviewing *Whittaker v. Howe*, 3 Beav. 383; *Rousillon v. Rousillon*, 14 Ch. Div. 351; *Match Co. v. Roeber*, (1887) 106 N. Y. 473; *Navigation Co. v. Winsor*, 20 Wall. 64.

³ The literature of the Sugar Trust

divide them, as dividends on the certificates, among the holders. Dividends have been declared and paid from profits paid in by the corporations. Though each corporation retained its directors, these have no power, and hold office at the pleasure of the trustees. For the benefit of the combination, and under authority of the deed, mortgages were placed on the property of some of the corporations. The purposes of the combination, as stated in the trust deed, are, *inter alia*, to furnish protection against unlawful combinations of labor; to protect against inducements to lower the standard of refined sugars; to promote the interests of the parties in all lawful and suitable ways. While the entire operations of all the corporations are practically controlled by the trustees, they themselves have no corporate existence; and the trust itself has never been attacked. Proceedings have been brought, however, against some of the companies entering into the combination, by the States of New York and California. The New York case was a suit by the People in the nature of *quo warranto*, seeking to

may be found in the following citations collected by Wm. H. Winters, in his "Bibliography of Commercial Trusts," 7 Ry. & Corp. L. J. 236: American Sugar Refining Co. Case, Cal.—7 Railw. & Corp. L. J. (1890) 88; Comm. 30 Centr. L. Jour. (1890) 114; Appointment of Receiver, Wallace, J., Decision, Feb. 17, 1890, Daily Alta Californian, Feb. 18, 1890; Case of The People v. North River Sugar Refining Co., Supreme Court, Circuit, Brief of Hon. Roger A. Pryor, Pamphlet, New York, 1888 (39 pp.); Reply of Hon. Roger A. Pryor, Pamphlet, New York, 1888 (9 pp.); Additional Brief for Plaintiff by the Attorney-General and Roger A. Pryor, Pamphlet, New York, 1889 (42 pp.); Brief for Appellant by John E. Parsons, Pamphlet, New York, 1889 (18 pp.); Brief for Defendant by Hon. Chas. P. Daly, Pamphlet, New York, 1889 (24 pp.); Argument for Defendants by James C. Carter, Pamphlet, New York, 1889 (62 pp.); Reprint of the same, Pamphlet (67 pp.); Opin-

ion of Hon. Geo. C. Barrett, with Briefs of Counsel, 22 Abb. N. C. (1889) 164; 19 N. Y. State Rep. 853; 16 N. Y. Civ. Proc. R. 1; 22 Amer. & Engl. Corp. Cas. 511; 5 Railw. & Corp. L. J. 56; 3 N. Y. Suppl. 401; 2 Lawy. Rep. Ann. 33; Judge Barrett and the Newspapers, 5 Railw. & Corp. L. Jour. (1889) 53-54; Supreme Court, General Term, Appellant's Brief, Pamphlet, 1889 (74 pp.); Respondents' Brief, Pamphlet, 1889 (74 pp.); Case on Appeal from Judgment, Pamphlet, 1889 (111 pp.); Opinion of Hon. Chas. Daniels, 7 N. Y. Supp. (1889) 406; 27 N. Y. State Rep. 282; 5 Lawy. Rep. Ann. 386; 2 N. Y. Law Jour. 1505, 1508; 36 N. Y. Daily Reg. 726; Court of Appeals Decision, 1890; Sugar Trust Injunction, 23 Abb. N. C. (1889) 314; 2 N. Y. Law Jour. (1890) 2155; Commonwealth Refining Company Incorporation, Conn. Special Acts 1889, p. 1095; Effect of Judge O'Brien's Decision, N. Y. Herald, Feb. 16, 1890.

forfeit the charter of the North River Sugar Refining Company, which under the direction of the trust board had closed its refinery and ceased operations. At special term of the Supreme Court, Judge Barrett delivered a learned opinion in which the authorities on the subject of monopoly were extensively reviewed, and decided that the defendant company in entering into the combination had exercised privileges not conferred upon it by law; and that the *ultra vires* act complained of, being injurious to the public, was, therefore, a proper ground of forfeiture.¹ The point was raised that the company itself, in its corporate capacity, had not entered into the combination, but only its shareholders in their individual capacity. The fact, however, that the trust deed provided for certain things to be done by the corporation and that these things had been done, constituted a ratification by the corporation of its shareholders' agreement and made the transaction properly a corporate act.² The case then went to the general term, where it was affirmed by the full court, Judge Daniel delivering an able opinion upon substantially the same lines as the decision at special term.³ But the New York Court of Appeals, while sustaining the judgment of forfeiture and affirming the lower court so far as to decide that it is unlawful for a corporation organized under the Manufacturing Act of 1848 to enter into a partnership agreement, amounting to a consolidation with other companies, otherwise

¹ *People v. North River Sugar Refining Co.*, (N. Y. Sup. Ct. Special Term 1889) 5 Ry. & Corp. L. J. 56. Quoting 2 Morawetz on Priv. Corporations, § 1024, the court said: "Mr. Morawetz states the rule with precision: 'A corporation may incur a forfeiture of its franchises by the doing of an illegal act. Any act of a corporation which is forbidden by its charter or by a general rule of law, and strictly every act which the charter does not expressly or impliedly authorize, is unlawful; and if the doing of such act is an injury to the public, it may be sufficient

ground of forfeiture.' The same rule is laid down in Kent, Taylor, Waterman, Kyd, Angell & Ames, and Green's Brice. 2 Kent, 312; Taylor, §§ 289, 457, 459; 2 Waterman, § 427; Kyd, §§ 479 *et seq.*; Angell & Ames, §§ 774, 775, 776; Green's Brice, 708, 709, 3 Ed. 787."

² *People v. North River Sugar Refining Co.*, (N. Y. Sup. Ct. Special Term 1889) 5 Ry. & Corp. L. J. 56. *Vide supra*, p. 115, note 1.

³ *People v. North River Sugar Refining Co.*, (N. Y. Sup. Ct. Gen. Term 1889) 6 Ry. & Corp. L. J. 442; s. c.; 7 N. Y. Supl. 406.

than as provided by the statutes regulating consolidation,¹ neither approved nor disapproved the *dicta* of the lower courts upon the collateral questions of monopoly; competition and restraint of trade.² For this court had formerly expressed a doubt as to whether competition is invariably a public benefaction and had said that it "may be carried on to such a degree as to become a general evil."³ The California case, against the American Sugar Refining Company, a corporation of that State, which had entered into the same combination of refineries, was similar in many respects to the New York case. In this case also it was argued that the transaction could not be made the basis of an attack upon the corporate charter, because the stock transfer was not a corporate transaction, but was the independent act of the stockholders as individuals; that even if, as a result of the transfer, the "Trust" did acquire the practical control of the corporate affairs, still that consequence was not one to be charged upon the corporation, which could act only through the agency provided by law — its constituted board of directors, duly assembled. But the court, while suggesting the identity of the shareholders and the corporation,⁴ did not venture to base its

¹ N. Y. Laws of 1867, ch. 960; N. Y. Laws of 1884, ch. 367.

² *People v. North River Sugar Refining Co.*, (1890) 121 N. Y. 583; s. c. 8 Ry. & Corp. L. J. 22. *Vide supra*, p. 109, note 2.

³ *Leslie v. Lorillard*, 110 N. Y. 519.

⁴ *People v. American Sugar Refining Co.*, (Super. Ct. San Francisco, 1890) 7 Ry. & Corp. L. J. 83, where the court said: "In support of this position the case of *Gashwiler v. Willis*, 33 Cal. 12, is relied on. But, as I conceive, there is a very plain distinction between that case and the one in hand. The property with which the stockholders in that case attempted to deal was *not theirs*, but was that of *the corporation itself*, and the decision was put in the main, if not altogether, upon that fact — the learned judge who

delivered the opinion observing as follows: 'The property in question (a quartz mine) was the property of the artificial being created by the statute. The whole title was in the corporation. The stockholders were not in their individual capacities owners of the property as tenants in common, joint tenants, co-partners or otherwise;' page 9. But the condition here is supposed to be precisely the reverse of that — the property with which the stockholders here undertook to deal was not the property of the corporation, but was their own. Of course the stock was the property of the stockholders who transferred it; but beyond that, the transfer of all the stock carried with it *the franchise* — which was theirs also — the individual collective right of the transferring stock-

judgment upon that ground, but decided that the corporation in carrying out the agreement of its shareholders, did act in its corporate capacity and accordingly subjected itself to the penalty of forfeiture.¹

§ 848. **The Standard Oil Trust.**—The Standard Oil Company has ever been a mystery to the courts and its existence has never been successfully attacked. In a recent case in which a rival in the oil business having bought one of its trust certificates, as it seemed, with hostile intent, sought to compel a transfer thereof to him upon the books of the trustees, it was held that it was necessary for a purchaser of certificates of shares in the trust to show affirmatively that there had been a compliance on his part with the requirements of the association, and with the conditions recited in the certificates, before he could maintain an action against the trustees

holders to be 'a body politic and corporate,' Cal. Civ. Code, § 296—to have a corporate name—'American Sugar Refinery Company' (id.)—by that name to have power of succession, the capacity to sue in courts of justice and, in short, to have all the corporate powers and privileges accorded to stockholders by the law of corporate organization. Sec. 354. These together constitute the corporate franchise—granted by the State, not to the corporation (for it was not then *in esse*), but to 'the persons signing the articles and their associates and successors.' Sec. 296. In other words, to the stockholders, then being or thereafter to be at any time during the existence of the corporation."

¹ *People v. American Sugar Refining Co.*, (Super. Ct. San Francisco, 1890) 7 Ry. & Corp. L. J. 83, where the court said: "But whether, and under what circumstances, if under any, an act done by the body of the stockholders is a corporate act, becomes unimportant here because of another fact appearing in

the record. I refer to the *scrip dividend* ordered by the board of directors of the defendant after the stock transfer to the Sugar Refineries Company had been made and by which certain undistributed profits—some \$250,000 in amount—were, notwithstanding the stock transfer, divided among the *ex-stockholders*. The transfer of the shares, unless modified by a collateral agreement, would, of course, operate as an assignment of these profits to the company. Such an agreement—one by which the transferring stockholders, notwithstanding they had parted with their stock, became the beneficial recipients of these profits—was made between them and the Sugar Refineries Company. This agreement between the stockholders and Mr. Searles concerning the disposition to be afterwards made of the undistributed profits was but executory in character; to carry it into execution required official corporate action—the favorable action of the board of directors duly assembled. And this was had."

to compel a transfer upon their books of the shares held by him; and that equity will not compel a transfer to a rival in business purchasing the certificates with hostile intent, but will leave the purchaser to his remedy at law.¹ Van Brunt, P. J. said: "There being no proof upon the trial of the agreement under which the Standard Oil Trust was formed, our sole knowledge as to the position and duties of the defendants, the trustees under said trust agreement, is derived from the allegations of the complaint so far as they were admitted by the answer. The Standard Oil Trust Association was created by agreements made in January, 1882. The principal place of business of the trust was the city of New York, and the trust was vested in nine persons as trustees, the defendants being the present trustees thereof. These agreements were made and adopted by the persons hereinbefore named, all of whom were engaged in mining, manufacturing, refining and dealing in petroleum, etc. One of the objects of the trust was to secure to the trustees the general supervision, so far as practicable, of the affairs of said corporations, partnerships and manufactories making or adopting said agreement, by electing

¹ *Rice v. Rockefeller*, (N. Y. Sup. Ct. Gen. Term, 1890) 8 Ry. & Corp. L. J. 129.

The certificate in evidence was as follows:

"Shares \$100 each.

"STANDARD OIL TRUST.

"Number 1,987. Shares 5.

"This is to certify that L. B. Mallaby is entitled to five shares in the equity to the property held by the trustees of the Standard Oil Trust, transferable only on the books of said trustees on surrender of this certificate. This certificate is issued upon condition that the holder, or any transferee thereof, shall be subject to all the provisions of the agreement creating said trust, and of the by-laws adopted in pursuance of said agreement, as fully as if he had signed the said trust agreement. Witness the hands of the president, secretary and treasurer of the board

of trustees, this 25th day of August, A. D. 1885, at the city of New York.

"WM. ROCKEFELLER, V. President.

"J. F. FREEMAN, A. Treasurer.

"H. M. FLAGLER, Secretary."

The following appears on the back of said certificate:

"For value received, I hereby sell and transfer to George Rice, of Marietta, Ohio, five shares of the Standard Oil Trust standing in my name on the books of said trust; and I hereby irrevocably appoint said George Rice my attorney to make the necessary transfer upon the books of said trust in accordance with the regulations thereof, and upon the conditions expressed on the face of this certificate.

"L. B. MALLABY.

"Dated August 26, 1885.

"In the presence of C. F. Streight-off."

the directors and officers thereof. We are ignorant as to what were its objects. Under said agreement, said nine trustees received from the parties assenting thereto certain stocks or bonds, for which they issued to the parties transferring the same to them 'Standard Oil Trust Certificates,' so called, transferable upon the books of the trustees. The parties so surrendering their stocks and bonds for said certificates, together with the transferees of said certificates, became the beneficiaries under the trust.¹ There is nothing in the allega-

¹ *Rice v. Rockefeller*, (N. Y. Sup. Ct. Gen. Term, 1890) 8 Ry. & Corp. L. J. 129, where the court continued: "It appears upon the face of said certificate that it does not purport to be a certificate of shares of stock, but simply a certificate of interest in the equity of certain property held by the defendants as trustees of the Standard Oil Trust, and that this interest was transferable only on the books of the trustees on the surrender of the certificate. In other words, in order that a person should be a transferee, so as to constitute him a beneficiary under the trust, it was necessary that the certificate should be transferred on the books of the trustees; the language of the certificate being: 'Transferable only on the books of the trustees on surrender of this certificate.' That the person became a transferee only by having the certificate transferred on the books of the company is further apparent by the subsequent language of the certificate, which is as follows: 'This certificate is issued upon condition that the holder or transferee shall be,' etc.—making a manifest distinction between the person who may be a holder of this certificate, and the one to whom the shares therein represented should be transferred upon the books of the trustees. Both the holder and any transferee

thereof were subject to the provisions of the agreement creating the trust, and the by-laws adopted in pursuance thereof. . . . But under the allegations in the complaint, which were admitted by the answer—which is the only source of knowledge which we have upon this appeal—the beneficiaries of the trust were only the transferees; and the mere holding of a certificate in no way conveyed such a title upon the holder as to make him a beneficiary of the trust. It further appears by the power of attorney upon the back of the certificate that the authority to make the necessary transfer upon the books of the trust was that it should be 'in accordance with the regulations thereof, and upon the conditions expressed on the face of this certificate.' It nowhere appears what these regulations are. Neither does it appear that there are no regulations governing the transfer, and there is no allegation and no proof that there has been any compliance with these regulations. The position of the plaintiff, therefore, is that of a person having bought a certain interest in the equity in property held by an association of which the defendants are the trustees, and he seeks to be admitted into this association without any proof of any right to such admission according to the articles

tions of the complaint which tends to show that this association exercises any of the rights of a corporation, or is subject to any of the restrictions governing corporations. In fact, we know little or nothing of the internal arrangements or constitution of this association, and can not, therefore, determine the rights of parties interested in these certificates. It is urged that this association is to be treated as though it were a joint-stock association. But, even if that were the case, it would not help in any respect the position of the plaintiff.”¹

§ 849. **The Cotton-Seed-Oil Trusts.**—The Louisiana case against the American Cotton Oil Trust was brought in behalf of the State to enjoin it from conducting business in Louisiana, upon the ground that it was an illegal association. This was the first attack aimed directly against any of the modern combinations known as trusts, and was decided in accordance with the ancient rules against joint-stock associations which still prevail in Louisiana,² the court saying: “The facts charged

of agreement of said association. We do not see how such a claim can be enforced. It is necessary for the plaintiff to show affirmatively that he has the right to be admitted before the court can compel his reception by decreeing a transfer of his shares of interest upon the books of the trustees.”

¹ *Rice v. Rockefeller*, 8 Ry. & Corp. L. J. 129. See further as to the Standard Oil Trust, the following cited in “Bibliography of Commercial Trusts,” by Wm. H. Winters, 7 Ry. & Corp. L. J. 236: Standard Oil Company,—Camden (J. N.) 136 No. Amer. Rev. (1888) pp. 181-190; Dodd (S. C. T.) Pamphlet, New York, 1888 (46 pp.); Hudson (J. F.) Railways and the Republic (1886) pp. 67-106; Lloyd (H. D.) 47 Atlantic Mo. (1881) pp. 317-334; Welch (J. C.) 136 No. Amer. Rev. (1888) pp. 191-200; Trust Agreement, N. Y. World, Feb. 28, 1888; N. Y. Senate Doc. No. 50 (1888) pp. 455-466; Brief History of,—Its Methods and Influence, Pamphlet,

New York, 1887 (23 pp.); Railway Discrimination in favor of, 1 Int. Commerce Com. Rep. (1888) 503; s. c. 1 Int. Com. Rep. (1888) 722; Report No. 3112, U. S. House of Representatives, 50th Congress, 1st Session, July 30, 1888, From the Committee on Manufactures in Relation to Trusts, Pamphlet, Washington, D. C., 1888, Part I, Sugar Trust (211 pp.), Part II, Standard Oil Trust (956 pp.).

² *State v. American Cotton Oil Trust*, 1 Ry. & Corp. L. J. 509; s. c. affirmed, 40 La. Ann. 8. The petition alleged “that the defendant association was formed about two years since in the city of New York, with a president, two vice-presidents, secretary and treasurer; that the agreement under which the said concern was organized, together with its by-laws, is kept a profound secret; that the trust is a gigantic monopoly formed for the purpose of acquiring and controlling the various cotton seed oil mills existing and operating

against the oil trust are acts that can be done only by a corporation; they can not legally be done by a partnership or by an unincorporated joint-stock company; they are not acts to be done by trustees. If an association of persons is acting as a corporation without being incorporated, they may be enjoined from so acting and from placing their stock on the market."¹ In 1884, a contract was entered into between four corporations engaged in manufacturing cotton seed oil at Memphis, for the formation of what is designated in the agreement as a "combination syndicate" and "partnership." The contracting mills agreed to select a committee, composed of representatives from each corporation, and to turn over to this committee the properties and machinery of each mill, to be managed and operated by this committee, through officers, agents and employes selected by them, for the common benefit, the profits and losses of the corporations to be shared in

in the different States of the south, for the purpose of depreciating the value and price of cotton seed and increasing the price of the products thereof formed by process of manufacture; that the trust has within the past year acquired a majority of the stock in the several corporations organized and operating in this State, under the laws thereof, for the purpose of purchasing cotton seed, and manufacturing therefrom cotton seed oil, soap, oil-cake, and other articles of commerce; that the trust acquired the majority of the stock in said corporations by exchanging certificates of stock in said corporations at a premium and advance thereon, and have elected directors and are controlling and operating said cotton oil-mills, the property of said corporations, solely for the interest and benefit of said illegal association; that in making said exchanges the said trust illegally fabricated, manufactured and issued certificates purporting to represent shares in the equity of the property held by the trustees of the American Oil Trust;

that the trust monopoly has succeeded in reducing cotton seed from fourteen dollars per ton to eight dollars per ton, and increasing seed products more than fifty per cent. in price; that the trust has closed two mills in this State; that the trust, although a foreign association, carries on business in this State without having any place of business therein, or any known agent upon whom process may be served; that the trust has obtained no license or permit, has paid no taxes either to the State or city government, and is without right to carry on business in this State; that Glenny & Violet are engaged in selling and dealing in so-called shares issued by the trust; that the said American Oil Trust has never been incorporated under the laws of this State, or any other State or country."

¹State v. American Cotton Oil Trust, 1 Ry. & Corp. L. J. 509; s. c. affirmed 40 La. Ann. 8. Cf. "Unregistered Companies," 17 Irish L. T. 381; "Associations, Legal & Illegal," 19 Irish L. T. 335.

proportions agreed upon. This arrangement was to last one year, but, with consent of all, might be renewed for two additional years, and, as appears, was at end of first year renewed for two other years. The possession of the several mills was turned over to this executive committee, and they were operated by those managers thenceforward under the name of the 'Independent Cotton Seed Association.' There was a provision in the contract by which other mills were to be admitted by consent, and a fifth corporation was in fact subsequently admitted. The Hanaur Oil Works was one of these contracting corporations, the contract being authorized by both shareholders and directors. In 1886, the business of the second year having been about concluded, the board of directors of the Hanaur Oil Works passed a resolution declaring this contract void, as being an agreement *ultra vires*, and their president was instructed to take possession of the mill. It was ultimately found necessary to bring suit for unlawful detainer in order to recover possession of the property; and the court held that the contract as to the remainder of the term was unexecuted and could be repudiated as *ultra vires*.¹ The decision was based solely upon the ground of *ultra vires*. "We have not deemed it necessary," said the court, "to consider the question of the legality of such a combination of corporations as one tending to create a monopoly, for the ground upon which we place the case needs no additional prop. The question of the validity of such an arrangement is a very grave one, but need not now be considered."²

¹ Mallory v. Hanaur Oil Works, (1888) 86 Tenn. 598; s. c. 4 Ry. & Corp. L. J. 202, where the court said: "It is, however, argued by the learned counsel for appellants that if it be a partnership, that it does not, therefore, follow that it is *ultra vires*; that such a contract, not being prohibited by law, or the charter of the defendant in error, or against public policy, is not void, even if in excess of power expressly conferred; that the business proposed by the contract, being within the purpose of the charter, is, there-

fore, within the implied powers of the corporation, and not *ultra vires*. In other words, 'that the question is not whether the corporation had, by virtue of the act of incorporation, authority to make the contract, but whether they are by those statutes forbidden to do it.' In this doctrine we do not concur. There is, however, respectable authority for the position." Vide *supra*, § 842.

² Mallory v. Hanaur Oil Works, (1888) 86 Tenn. 598; s. c. 4 Ry. & Corp. L. J. 202.

§ 850. The Diamond Match Trust.— A corporation known as the “Diamond Match Company” was organized under articles of incorporation which stated that its business was to manufacture, buy, sell and deal in friction matches, and all articles entering into the composition and manufacture thereof, and also in machines and machinery, whether applicable to the manufacture of friction matches, or to other purposes, and to purchase, own, and sell exclusive rights under letters patent relating to the manufacture of friction matches, and to machines and machinery applicable thereto, or to other purposes, and to buy, sell, own and deal in any real or personal property necessary or convenient to the prosecution of said business. It appeared that the object of the corporation was to buy up the property of all individuals or corporations engaged in the manufacture of friction matches, exacting from the manufacturer, in every case of transfer, a bond, that he would not for a term of years engage in, or aid anyone else in, the manufacture of matches in any place where his action might conflict with the interests, or diminish the sales, or lessen the profits, of the Diamond Match Company. Suit was brought in Michigan to restrain the defendants from disposing of certain stock in the match company held by them as security for a loan to the complainant to enable him to purchase it; and the circuit court granted the injunction; but on appeal the purposes of the company were declared to be unlawful and any contract made to further them to be void as against public policy and such as the court would neither enforce while executory nor relieve against when executed,¹ although it was shown that the enterprise had in fact reduced the price of matches, the court assum-

¹ *Richardson v. Buhl*, (Mich. 1889) 7 Ry. & Corp. L. J. 89. Sherwood, C. J.; in a lengthy decision citing no authorities, concludes: “All combinations among persons or corporations for the purpose of raising or controlling the prices of merchandise or any of the necessities of life, are monopolies, and intolerable, and ought to receive the condemnation of all courts. In my judgment not

only is the enterprise in which the Diamond Match Company is engaged an unlawful one, but the contract in question in this case, being made to further its objects and purposes, is void upon the ground that it is against public policy. The decree at the circuit should be reversed, and the complainant’s bill dismissed with costs.”

ing that the price had been lowered for the purpose of crushing competition.¹

§ 851. The Chicago Gas Trust.—The Chicago Gas Trust Company was organized under the general incorporation law of Illinois. The statement filed by the original incorporators with the Secretary of State sets forth that the Trust Company was formed for two objects, or for one object of a two-fold character, in brief, the erection and operation of works in Chicago and other places in Illinois, for the manufacture, sale and distribution of gas and electricity; and “to purchase and hold or sell the capital stock” of any gas or electric company or companies in Chicago or elsewhere in Illinois. In the recent proceeding against it, no attack was made upon the valid-

¹ Campbell, J. said: It is no answer to say that this monopoly has in fact reduced the price of friction matches. That policy may have been necessary to crush competition. The fact exists that it rests in the discretion of this company at any time to raise the price to an exorbitant degree. Such combinations have frequently been condemned by courts as unlawful, and against public policy. *Hooker v. Vandewater*, 4 Denio, 349; *Stanton v. Allen*, 5 Denio, 434; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 186; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 672; *Craft v. McConoughy*, 79 Ill. 346; *Hoffman v. Brooks*, 11 Week. Cin. Law. Bul. 258; *Hannah v. Fife*, 27 Mich. 172; *Alger v. Thacher*, 19 Pick. 51. It is also well settled that if a contract be void as against public policy, the court will neither enforce it while executory, nor relieve a party from loss by having performed it in part. *Foote v. Emerson*, 10 Vt. 344; and see *Hanson v. Power*, 8 Dana, 91; *Pratt v. Adams*, 7 Paige, 616; *Pratt v. Oliver*, 1 McLean, 800; s. c. 2 McLean, 277; *Stanton v. Allen*, 5 Denio, 434. It is not necessary that the parties,

or either of them, should rely upon the fact that the contract is one which it is against the policy of the law to enforce. Courts will take notice, of their own motion, of illegal contracts which come before them for adjudication, and will leave the parties where they have placed themselves. Campbell, J., concurred with Chaplin, J. Long, J.: “I concur in the result reached by Mr. Justice Sherwood in this case. I am not, however, entirely satisfied with many of the reasons he gives for his conclusions. Whether the organization of the Diamond Match Company is one against public policy I do not propose to discuss. Defendants are not members of the company, nor have they ever been. They claim the right to sell and dispose of this stock so held by them as security, and to realize therefrom the amount then due under the contract. By the terms of the contract they have the right to pursue this course. By the decree of the court below they were restrained from making this sale. I agree with Mr. Justice Sherwood that the decree of the court below be dismissed, with costs.” Morse, J., did not sit.

ity of the organization of the Gas Trust Company as a corporation. That it was formed in strict conformity with the requirements of the general incorporation law, was not denied by the People. Nor did the State question the right to acquire and operate works for the manufacture and sale of gas and electricity in pursuance of the object designated in the first clause above mentioned. The controversy presented by the record related solely to its authority to purchase and hold the capital stock of other gas companies. The information charged that by so purchasing and holding a majority of the shares of the capital stock of other companies, the appellee usurped and exercised "powers, liberties, privileges and franchises not conferred by law." The appellee pleaded in justification, that the power so to purchase and hold the stock is granted by the terms of its charter, and the decision was based upon the technical rule of *ultra vires*;¹ and whatever else may be said as *dicta*, the case is authority simply for the proposition that a corporation created under the general act of Illinois has no power to purchase the stock of other corporations created under the same law for the purpose of carrying on the same business.²

§ 852. **The Cattle Trust.**—In a late case involving the validity of the trust certificates of the American Cattle Trust, the court declined to pass upon the question whether or not the object of the association was to form such a combination against the freedom of trade and competition as is contrary to public policy.³ And in declining to grant the injunction

¹ *People v. Chicago Gas Trust Co.*, (Ill. 1889) 7 Ry. & Corp. L. J. 23, 27, where the court said: The word "unlawful" as applied to corporations is not used exclusively in the sense of *malum in se* or *malum prohibitum*. It is also used to designate powers which corporations are not authorized to exercise, or contracts which they are not authorized to make, or acts which they are not authorized to do; or, in other words, such acts, powers and contracts as are *ultra vires*."

² *People v. Chicago Gas Trust Co.*, (Ill. 1889) 7 Ry. & Corp. L. J. 23.

³ *Gould v. Head*, (1890) 38 Fed. Rep. 886; s. c. 7 Ry. & Corp. L. J. 402, where Phillips, J., in the outset says: "I do not feel called upon, in the determination of the questions raised by the exceptions, to pass upon the question whether or not the real object and inspiration of the American Cattle Trust was to form such a combination against the freedom of trade and competition as to subject it to the disability

prayed for, the court quoting from the Louisiana Cotton Oil Case said: "If, as alleged, these certificates have been taken as a price in exchange for ten million dollars of property transferred to the trust, then, whatever be their validity and effect as shares of stock, whether or not they confer on the holders the privileges of corporate stockholders, or whether or not they confer the right to participate in the carrying on of any illegal business, yet they undoubtedly do represent an interest in the property referred to, and as such have a legal and real value; and we can not understand how such property rights can be placed *hors de commerce* by an injunction."¹ On a previous hearing, however, the court had decided that a mercantile corporation can not, by an arrangement with other corporations, place its stock in the hands of trustees with power to manage the affairs of all the companies as one, for the purpose of increasing its profits, thus substituting the trustees as the governing body of the corporation instead of its officers, as such an act is inconsistent with the purposes of its creation.²

§ 853. The Alcohol Trust.—The Alcohol Trust was a combination of distillers for the purpose of obviating the evils of ruinous competition and overproduction, not only by limiting the production of the distilleries in operation but also by closing up those that could not be profitably conducted. The Nebraska Distilling Company had conveyed its property to the trustees; but the Supreme Court of Nebraska held that the purpose being contrary to public policy, the conveyance was *ultra vires* and passed no title to the property.³ The cau-

of being contrary to public policy. The trust company, as such, is not before the court; and counsel for defendant declines to urge such objection against the character of the trust."

¹ Gould v. Head, (1890) 38 Fed. Rep. 886, citing State v. American Cotton Oil Trust, 40 La. Ann. 8.

² Gould v. Head, (1889) 38 Fed. Rep. 886.

³ Any contract entered into with

such an object in view is, under the laws of the State, null and void; and the conveyance from the distilling company to the trust was in contravention of the authority conferred by statute on that company, in excess of the powers granted by its charter, and against public policy, and no title passed by such conveyance. State v. Nebraska Distilling Co., (Neb. 1890) 8 Ry. & Corp. L. J. 323.

tion with which the courts in these cases, although inveighing against the evils of monopoly, fall back upon the technical rule of *ultra vires* is significant.¹

¹ Thus in *State v. Nebraska Distilling Co.*, (Neb. 1890) 8 Ry. & Corp. L. J. 323, it is said the acts of a corporation to be unlawful need not necessarily be *mala prohibita* or *mala in se*, although such acts are illegal in all cases; but any act of a corporation which, by the terms of its charter, it is not authorized to do, is in excess of its powers, and therefore unlawful. In this case, quoting the Supreme Court of the United States, the court said, in speaking of the proper construction of articles of association of corporations organized under general laws: "We have to consider, when such articles become the subject of construction, that they are, in a sense, *ex parte*. Their formation and execution — what shall be put into them as well as what shall be left out — do not take place under the supervision of any official authority whatever. They are the production of private citizens, gotten up in the interest of the parties who propose to become corporators, and stimulated by their zeal for the personal advantage of the parties concerned, rather than the general good. . . . These articles, which necessarily assume by the sole action of the corporators enormous powers, many of which have been heretofore considered of a public character, sometimes affecting the interests of the public very largely and very seriously, do not commend themselves to the judicial mind as a class of instruments requiring or justifying any very liberal construction. Where the question is whether they conform to the authority given by statute in regard to corporate organizations, it is al-

ways to be determined upon just construction of the powers granted therein, with a due regard for all the other laws of the State upon that subject. . . . The manner in which these powers shall be exercised and their subjection to the restraint of the general laws of the State and its general principles of public policy, are not in any sense enlarged by inserting in the articles of association the authority to depart therefrom.' This, we think, is a correct construction of the law relating to such articles, and we adopt the same." *State v. Nebraska Distilling Co.*, (Neb. 1890) 8 Ry. & Corp. L. J. 323, where the court also said: "Alcohol is an article of commerce. It is applied to a thousand uses in arts and manufactures. The amount which is rectified and used as intoxicating drink forms but a very small part of the quantity actually distilled. And being an article of commerce, any contract creating a monopoly therein is against public policy, and void." Then recurring to the technical rule, the court continued: "A corporation can exercise no powers except such as are granted to it by the charter under which it exists. (*Thomas v. The Railroad*, 101 U. S. 71; *Oregon Ry. & Nav. Co. v. Oregonian Ry. Co.*, 130 U. S. 1.) It is no part of the powers of the distilling company to sell all its property, real and personal, together with the franchises and powers necessary to properly carry on the business. (*Oregon Ry. & Nav. Co. v. Oregonian Ry. Co.*, 130 U. S. 1.) The fact that the corporation has authority to put an end to its existence by a vote of a majority of its stock-

§ 854. **The Steamship Conference.**—Certain English shipping companies and ship owners combined to form a “conference” or “ring;” and their agents in China issued circulars to shippers there to the effect that exporters in China who confined their shipments of goods to vessels owned by members of the “conference” should be allowed a certain rebate, payable half yearly, on the freight charged, any shipment at any port in China by an outside steamer to exclude the shipper from participating in the return during the whole six monthly period within which that shipment should have been made. The plaintiffs, who were owners of vessels in the same trade, had thereby suffered damage; but it was held that the “conference,” being formed by the defendants with the view of keeping the trade in their own hands, and not with the view of ruining the trade of the plaintiffs, or through any personal malice or ill-will towards them, was not unlawful, and that no action for conspiracy was maintainable.¹ In this case Lord Justice Bowen said in substance, there seem to be no burdens or restrictions in law upon a trader which arise merely from the fact that he is a trader, and which are not equally laid on all other subjects of the Crown. Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it.² But the defendants have been guilty of none of these acts. They have done nothing more against the plaintiffs

holders, in which event it may proceed to settle up its affairs, dispose of its property and divide its capital stock, and surrender its charter to the State, does not authorize it to terminate its existence by a sale and disposal of all its property and rights. *Oregon Ry. & Nav. Co. v. Oregonian Ry. Co.*, 130 U. S. 1.”

¹ *Mogul Steamship Co., Limited v. McGregor*, (Eng. Ct. of App. 1889) 7 Ry. & Corp. L. J. 223.

² The intentional driving away of customers by show of violence, (*Tarleton v. M'Gawley*, Peak N. P. C. 270) the obstruction of actors on the

stage by preconcerted hissing, (*Clifford v. Brandon*, 2 Camp. 358; *Gregory v. Brunswick*, 6 M. & G. 205) the disturbance of wild fowl in decoys by firing of guns, (*Carrington v. Taylor*, 11 East, 571; and *Keeble v. Hichergill*, 11 East, 574, n.) the impeding or threatening servants or workmen, (*Garret v. Taylor*, Cro. Jac. 567) the inducing persons under personal contracts to break their contracts, (*Bowen v. Hall*, 6 Q. B. Div. 336; *Lumley v. Gye*, 2 E. & B. 216) all are instances of these forbidden acts.

than pursue to the bitter end a war of competition waged in the interests of their own trade. To the argument that a competition so pursued ceases to have a "just cause or excuse," when there is ill will or a personal intention to harm, it is sufficient to reply that there was here no personal intention to do any other or greater harm to the plaintiffs than such as was necessarily involved in the desire to attract to the defendants' ships the entire tea freights of the ports, a portion of which would otherwise have fallen to the plaintiffs' share. No authority can be found for the doctrine that such a commercial motive deprives of "just cause or excuse" acts done in the course of trade which would, but for such a motive, be justifiable. So to hold would be to convert into an illegal motive the instinct of self-advancement and self-protection, which is the very incentive to all trade.¹ Of the general proposition that certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several, there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which, if it proceeded only from a single person, would be otherwise; and the very fact of the combination may show that the object is simply to do harm and not to exercise one's own just rights. In the application of this undoubted principle it is necessary to be very careful not to press the

¹ *Mogul Steamship Co., Limited v. McGregor*, (Eng. Ct. of App. 1889) 7 Ry. & Corp. L. J. 223, saying: "All commercial men with capital are acquainted with the ordinary expedient of sowing one year a crop of apparently unfruitful prices in order by driving competition away to reap a fuller harvest of profit in the future, and until the present argument at the bar, it may be doubted whether ship owners or merchants were ever deemed to be bound by law to conform to some imaginary 'normal' standard of freights or prices, or that law courts had a right to say to them in respect of their competitive tariffs—'Thus far shall they go and no further.' To attempt

to limit English competition in this way, would probably be as hopeless an endeavor as the experiment of King Canute. But on ordinary principles of law no such fetter on freedom of trade can, in my opinion, be warranted. A man is bound not to use his property so as to infringe upon another's rights—*Sic utere tuo ut alienum non lædas*. If engaged in actions which may involve danger to others, he ought, speaking generally, to take reasonable care to avoid endangering them. But there is surely no doctrine of law which compels him to use his property in a way that judges and juries may consider 'reasonable.' See *Chesmore v. Richards*, 7 H. of L. C. 349."

doctrine of illegal conspiracy beyond that which is necessary for the protection of individuals or of the public; and it may be observed in passing that as a rule it is the damage wrongfully done and not the conspiracy, that is the gist of actions on the case for conspiracy.¹ Lastly, we are asked to hold the plaintiffs' conference or association illegal as being in restraint of trade. The term "illegal" here is a misleading one. Contracts, as they are called, in restraint of trade *are not, in my opinion, illegal in any sense except that the law will not enforce them*. It does not prohibit the making of such contracts — it merely declines after they have been made to recognize their validity. The law considers the disadvantage so imposed upon the contract, a sufficient shelter to the public.²

¹ *Mogul Steamship Co., Limited v. McGregor*, 7 Ry. & Corp. L. J. 223, saying: "See *Skinner v. Gunton*, 1 Wm. Saund. 229; *Hutchins v. Hutchins*, 7 Hill's N. Y. Cas. 104; *Bigelow's Leading Cases on Torts*, 207. But what is the definition of an illegal combination? It is an agreement by one or more to do an unlawful act or to do a lawful act by unlawful means. *Regina v. O'Connell*, 11 Cl. & F. 155; *Regina v. Parnell*, 14 Cox C. C. 508. And the question to be solved is whether there has been any such agreement here. Have the defendants combined to do an unlawful act? Have they combined to do a lawful act by unlawful means? A moment's consideration will be sufficient to show that this new inquiry only drives us back to the circle of definitions and legal propositions which I have already traversed in the previous part of this judgment."

² *Mogul Steamship Co., Limited v. McGregor*, 7 Ry. & Corp. L. J. 223, continuing: "The language of *Compton, J.*, in *Hilton v. Eckersley*, 6 E. & B. 47, is I think not to be supported. No action at common law will lie or ever has lain against any individual or individuals for entering into a contract merely because

it is in restraint of trade. Lord Eldon's equity decision in *Cousins v. Smith*, 13 Ves. 542, is not very intelligible even if it be not open to the somewhat personal criticism passed on it by Lord Campbell in his 'Lives of the Chancellors.' If indeed it could be plainly proved that the mere formation of 'conferences,' 'trusts,' or 'associations' such as these was always necessarily injurious to the public — a view which involves perhaps the disputed assumption that in a country of free trade and one which is not under the iron regime of statutory monopolies, such confederations can never be really successful — and if the evil of them were not sufficiently dealt with by the common law rule, which held such agreements to be void as distinct from holding them to be criminal, there might be some reason for thinking that the common law ought to discover within its arsenal of sound common sense principles some further remedy commensurate with the mischief. Neither of these assumptions are to my mind at all evident, nor is it the province of judges to mould and stretch the law of conspiracy in order to keep pace with the calculations of political

§ 855. **Legality of shareholders' voting trusts.**—The grounds upon which proceedings of corporations have been held void as beyond their charter powers have been: First, because the charter, when accepted, constitutes a contract between the stockholders that the corporation shall be confined to its proper business and that a majority can not change it;¹ second, because public policy requires that they should be confined to the business and the mode of managing business prescribed by the charter, which is their law.² It is evident that neither of these reasons is applicable to stockholders' voting trusts, unless, as in the North River Sugar Refinery Case, the corporations, by ratifying their shareholders' private agreement, become parties to the contract.³ For it is not against the policy of the law to accord to the owners of the larger interests in the stock a right to control the corporation.⁴ It is not against the policy of the law for two or more persons to

economy. If peaceable and honest combinations of capital for purposes of trade competition are to be struck at, it must, I think, be by legislation, for I do not see that they are under the ban of the common law."

¹Potter, J., in *Allen v. Woonsocket Co.*, (1876) 11 R. I. 288, 300, where the court further said: "A minority have been held bound in some cases by the fact of the acquiescence in or ratification of the acts of the majority. In the present case there was no one who had a right to complain on this ground, Crawford Allen being sole stockholder."

²Potter, J., in *Allen v. Woonsocket Co.*, (1876) 11 R. I. 288, 300, continuing, said: "No portion of the act specifies even by implication the business to be done, and nothing can be implied even from its name." In *Allen v. Woonsocket Co.*, (1876) 11 R. I. 288, 301, the court said: "In this case the contention is that the respondent had no right to form a partnership, that a corporation must transact its business through its proper officers, and can not delegate

its powers in such a manner as to put its business beyond its control. If the partnership had been for a definite period, it might well be argued that the respondent had no right to make such a contract. But it was a mere partnership at will, terminable at any moment by either party. The respondent, therefore, did no more part with the control of the business than if it had employed Phillip Allen & Sons simply as agents, and its right to do that can not very well be denied."

³*Vide supra*, § 847; Voting Trusts, 5 Railw. & Corp. L. J. (1889) 597; 19 Abb. N. C. (1888) Note of Cases, p. 448; 84 Ala. (1888) 608; 6 Pa. Co. Ct. Rep. (1889) 193; 7 Railw. & Corp. L. J. (1890) 87; The Atchison, 6 Railw. & Corp. L. J. (1889) 501; Beach, (Charles F., Jr.) 7 id. (1890) 21-22; The Reading, N. Y. Star, Jan. 11, 1890; 7 Railw. & Corp. L. J. (1890) 87; 47 Leg. Int. (1890) 26—cited by Wm. H. Winters in "The Bibliography of Commercial Trusts," (1890) 7 Ry. & Corp. L. J. 236.

⁴*Barnes v. Brown* 80 N. Y. 527.

hold shares of stock jointly as partners.¹ It is not against the policy of the law for owners of stock to place their shares in trust.² And if the trustee and *cestui que trust*, or the pledgor and pledgee, agree as to which of the two shall cast the vote, their decision is binding and conclusive, and third party stockholders have not a right to appeal to equity to set aside the agreement.³ To secure the continuance of the copartnership, shareholders may agree *inter sese* to deposit the stock by way of pledge to and with and in the name of a trust company until the objects of the copartnership be accomplished;⁴

¹ If a purchase for joint account be made, those severally interested therein become partners, precisely as they would have become partners had the venture been in grain or coal. *Weed v. Littlefalls*, 31 Minn. 154.

² Such a trust or pledge may be lawfully entered into, and when so perfected is in the hands of the trustee or pledgee known as a voluntary and active trust, and such trust may be created with regard to stock certificates and shares. *Stone v. Hackett*, 12 Gray, 230.

³ *Hopping v. Buffam*, 9 R. I. 518; *Vowell v. Thompson*, 8 Cranch, C. C. 428; *Strong v. Smith*, 15 Hun, 222, cited by Clarence A. Seward in Brief for Defendants in *Starbuck v. Shepang, L. & N. R. Co.*, (Super. Ct. Fairfield Co. Conn. 1890) not yet reported. The right of suffrage may be lawfully disassociated from that to which the exercise of the right appertains, and one may lawfully hold the property and another may lawfully exercise the right of suffrage. This has been so from time immemorial. An advowson or a right of presentation to a vacant living reposes in the owner of the manor; if he mortgages the manor, and the mortgagee enters and takes possession, equity, if the circumstances justify the exercise of the power,

will direct the mortgagee to vote as the mortgagor may require, or to give the mortgagor a proxy. *Craft v. Powel*, Comyn's Rep. 609; *Amhurst v. Dowling*, 2 Vernon, 401; *MacKenzie v. Robinson*, 3 Atkyns, 559. The same principle has been established as law in this country with relation to corporate stock since 1829. Thus, in *Vowell v. Thompson*, 3 Cranch, C. C. 428, where three hundred shares of stock had been transferred to the defendant in trust as collateral security for a debt, the court said, the question was whether before forfeiture and foreclosure the mortgagor is not entitled to vote and for that purpose to obtain a proxy of power from the trustees, and it asserted the analogy between an elective franchise and the advowson, and said that they were of the opinion that the defendant should be ordered to give the plaintiff a power of attorney to vote upon the stock until it had been sold under the mortgage or deed of trust. See also *Bradford & Co. R. Co. v. New York & Co. R. Co.*, as stated *supra* page 96.

⁴ The law permits this. Such a pledge is the legal equivalent of an agreement *inter sese* not to sell for a like period and for corresponding purposes, and for a division of profits at the close of the copartnership; and such an agreement the law as-

taking receipts or trust certificates therefor.¹ Such an agreement, so lawfully formed at the outset, and for a proper consideration, and for a limited period, is binding upon the holders of the trust certificates claiming only under and by virtue of the stock deposited in pursuance thereof, and all the terms of which are, by appropriate statement, made a portion of the trust certificates. Even if one of the motives which led to the creation of the trust was to enable either the trustee or the *cestui que trust* to vote in a given manner at an approaching election, that motive will not invalidate the transfer.² Voting trusts then not being illegal upon any principle peculiar to corporation law, can be attacked only on the ground of public policy. What agreements are void as against public policy, is very well defined in the law, and contracts which have been held to be so void arrange themselves in five classes: (a) those founded upon corrupt considerations or moral turpitude; (b) those in violation of a public trust; (c) those in restraint of trade; (d) those in restraint of marriage; (e) those to influence persons in authority.³ But an agreement by all the members of a copartnership owning one or more shares of stock, that the same shall be conveyed to a trustee for the benefit of the copartnership and until its objects are accomplished, and that the trustee shall vote thereon in accordance with the instructions of the copartners, is not such an agreement as falls within any one of these five classes of contracts which are void upon grounds of public policy. Some new class must be invented, and some new definition of public policy be found, before such a voting trust can be said to fall within any of the recognized rules which avoid a contract as being against public policy.⁴

serts to be valid. *Havemeyer v. field Co. Conn. 1890*) not yet reported. *Havemeyer*, 43 N. Y. Super. Ct. Rep. 506; affirmed 86 N. Y. 618; *Fisher v. Bush*, 35 Hun, 641.

¹ As to the validity of trust certificates, see: *Crawford v. Gross*, 7 Ry. & Corp. L. J. 123.

² *State v. Smith*, 48 Vt. 290, cited by Clarence A. Seward in Brief for Defendants in *Starbuck v. Shepang*, L. & N. R. Co., (Super. Ct. Fair-

³ 4 Bouvier's Inst. § 3854.

⁴ Clarence A. Seward's Brief for Defendants in *Starbuck v. Shepang*, L. & N. R. Co., (Super. Ct. Fairfield Co. Conn. 1890) not yet reported. The decision in the case of the Reading Trust, *Shelmerdine v. Welsh*, (Pa. Com. Pl. 1890) 47 Leg. Int. 26, shows that such a trust will not be ad-

§ 856. The bibliography of trusts.—An extensive literature on the subject of trust combinations has sprung up of late years, not only in the regular legal publications,¹ but also

judged to be void upon the grounds of public policy.

¹ "The Bibliography of Commercial Trusts—Law Literature of Trust Combinations, Monopolies, etc." by Wm. H. Winters, Librarian of the New York Law Institute, (1890) 7 Ry. & Corp. L. J. 236, citing: Abbott (Austin), 32 Daily Reg. (1887) 812; 34 id. (1888) 484, 572; Beach (Charles F., Jr.), 3 Railw. & Corp. L. J. (1888) 217-21; Dwight (Theo. W.), 3 Pol. Sci. Quar (1888) 592-632; 28 Centr. L. Jour. (1889) 29; Heinsheimer (N.), 2 Columbia L. Times (1888) 51-58; 4 Pol. Sci. Quar. (1889) 190-3; Mickey (D. M.), 22 Am. L. Rev. (1888) 538-549; 20 Week. L. Bull. (1888) 159-165; Ross (Geo. W.), 10 Chic. Law Jour. (1889) 112-144; Stimson (F. J.), 1 Harvard Law Rev. (1877) 132-143; Uhle (J. B.), Amer. L. Reg. N. S. Legal Misc., Sept. No. 1888, pp. v, vi.—Adams (Geo. H.), The "Trusts" and the Civil Code, Pamphlet, New York, 1888 (8 pp.). Beach (Charles F., Jr.), Facts about Trusts, Pamphlet, New York, 1889 (72 pp.); Railway Federation,—the Proposed Railway Trusts, Pamphlet, New York, 1890 (20 pp.). Dodd (S. C. T.), Combinations,—Their Uses and Abuses; with a History of the Standard Oil Trust, Pamphlet, New York, 1888 (46 pp.); Statement of Pending Legislation and its Consequences, Pamphlet, New York, 1887 (25 pp.); Combination and Competition,—an address delivered before the Merchants' Association of Boston, Jan. 8, 1889, Pamphlet, New York, 1889, (17 pp.); 5 Railw. & Corp. L. Jour. (1889) 97-100; Authorities on Combinations, Pamphlet, New York, 1889

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in newspapers, general magazines, pamphlets, reports and addresses.¹ Much that is valuable in this ephemeral literature would be lost to the profession and to the student of political economy but for the diligent researches of Mr. William H.

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- ¹ "Bibliography of Commercial Trusts," by Wm. H. Winters, (1890) 7 *Ry. & Corp. L. J.* 236, citing: What shall be done with Trusts, M. L. Swift, 10 *Andover Rev.* (1888) 109-127; Pamphlet Reprint, 18 pp.; A Tyrant Trust, N. Y. *Evening World*, June 28, 1889; After the Trusts, Views of S. C. T. Dodd, John R. Dos Passos, John E. Parsons, etc., N. Y. *Mail and Express*, Feb. 1, 1890; American Cotton Oil Trust, How a Million was lost, N. Y. *Evening Post*, Sept. 2, 1889; American Cotton Oil Trust Secrets, N. Y. *Times*, Feb. 15, 1890; An Old Trust, 1579, *Independent*, June 13, 1889; Book Trust, N. Y. *Mail and Express*, Feb. 7, 1890; N. Y. *World*, Mar. 7, 1890; Butchers, Envelope, Milk, Oil and Rubber Trusts, N. Y. *Times*, Feb. 24-29, 1888; Chicago Gas Trust, N. Y. *Daily Times*, Jan. 4, 1888; 5 *Ry. & Corp. L. J.* (1889) 536; Coffin-Makers' and Undertakers' Trust, *Industrial Journal*, Feb. 1889; Defense of Trusts, S. C. T. Dodd, N. Y. *Tribune*, Feb. 2, 1890; Effect of Trust Combinations, N. Y. *Comm. Bull.*, April 1, 1889; Farmers' Trust of the Northwest, N. Y. *Comm. Advertiser*, Mar. 26, 1888; Ferry Syndicate of New York City, N. Y. *Star*, Feb. 20, 1890; Foes of Competition, N. Y. *Daily Times*, Feb. 20, Feb. 27, Mar. 19, 1888; N. Y. *Daily World*, Feb. 21, 1888; Frenzy for Trusts, N. Y. *Evening Sun*, June 27, 1889; How Fortunes are Made,—Combination as a Fortune-Getter, Erastus Wiman, N. Y. *Tribune*, Dec. 5, 1889; Lead Trust Secrets, N. Y. *Herald*,

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- ² Kansas Laws, 1889, ch. 257, pp. 389-392; Maine Laws, 1889, ch. 266, pp. 235, 236; Missouri Laws,

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CHAPTER XLII.

ACTIONS BY AND AGAINST CORPORATIONS.

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| <p>§ 857. Introductory.</p> <p>858. Venue.</p> <p>859. Service of corporations.</p> <p>860. Averments necessary in suits by corporations.</p> <p>861. Verification of corporate pleadings.</p> <p>862. Necessary allegations in complaints against corporations.</p> <p>863. Allegation of agents' authority unnecessary.</p> <p>864. Misnomer.</p> <p>865. Actions against corporations on notes.</p> <p>866. Corporate existence and powers not to be collaterally attacked.</p> <p>867. <i>Nul tiel corporation</i>—(a) In general.</p> | <p>§ 868. (b) Not to be raised by demurrer.</p> <p>869. (c) Not-raised by the general issue.</p> <p>870. (d) Not to be raised after verdict.</p> <p>871. (e) Estoppel.</p> <p>872. (f) A "company" <i>prima facie</i> a corporation.</p> <p>873. Evidence of corporate existence—(a) Certificates and copies.</p> <p>874. (b) Performance of corporate acts.</p> <p>875. (c) Of foreign corporations.</p> <p>876. Production of corporate books.</p> <p>877. Production of books of foreign corporations.</p> |
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§ 857. **Introductory.**—Among the chief characteristics of corporations is the power and capacity to sue and to be sued in the corporate name like natural persons.¹ This is expressly provided by the constitutions and statutes of many States.² Accordingly in an action brought in a name appro-

¹ *Vide supra*, § 372.

² Stimpson's Am. Stat. Law, (1886) citing the constitutions of New York, Michigan, Minnesota, Kansas, Nebraska, North Carolina, Alabama, California and Nevada; *Home Protection v. Richards*, 74 Ala. 466; *Mobile Life Ins. Co. v. Pruett*, 74 Ala. 487. And it is provided by statute in Wisconsin that the proceedings in actions to which they are parties shall be the same as in the case of natural persons. Wis.

Rev. Stat. § 3204; *Skinner v. Richardson*, 76 Wis. 464. The constitution of Pennsylvania prohibits the enactment of any statute of limitation with respect to actions against corporations for injuries to person or property, differing from the general laws relating to similar actions against natural persons. Pa. Const. (1874) art. iii, § 21. In New York, however, the defense of usury is denied to corporations although not to natural persons. *Isle of Wight Co.*

priate for a corporation or which may fairly import corporate character, the capacity to sue not being put in issue, the capacity to sue, and corporate existence, if necessary, will be presumed for the purposes of the suit; and, the incapacity to sue not appearing on the face of the complaint, it is not subject to demurrer founded on such objection, and will support a judgment by default on appeal.¹ And again when plaintiffs sue as trustees of an incorporated society, of a kind authorized by statute, the name under which the suit is prosecuted imports a corporation, and shows a capacity to use.²

§ 858. **Venue.**—A law which provides that an action shall be commenced and tried in the county in which the defendants reside or may be found at the commencement of the action, applies to corporations, as well as to natural persons.³ A statute authorizing a corporation to be sued in any county in which it transacts business through its agents, is not an infringement of a constitutional provision that corporations shall be subject to be sued “in like cases as natural persons.”⁴ The constitution of California provides that actions may be brought against a corporation in any county where it does business, or where the contract sought to be enforced was made or the liability incurred.⁵ Statutory provisions that actions may be brought against insurance companies in any county where the cause of action arises, are remedial; and such an action may be brought in a county where the company has no agent.⁶ But it is held in Louisiana that an action against a railroad company for damages for injuries resulting from its neglect to maintain a sufficient crossing must be brought at the domicile of the company, as these actions are not within the exception of the statute, providing that in all cases where any corporation shall commit trespass, or do anything for which an action for damages lies, it shall

v. Smith, 51 Hun, 562; s. c. 4 N. Y. Supp. 73.

¹ *Seymour v. Thomas Harrow Co.*, (1887) 81 Ala. 250.

² *Smythe v. Scott*, (Ind. 1890) 24 N. E. Rep. 685.

³ *Holgate v. Oregon Pac. Ry. Co.*, 16 Oregon, 123.

⁴ *Home Protection v. Richards*, 74 Ala. 466; *Mobile Life Ins. Co. v. Pruett*, 74 Ala. 487.

⁵ Cal. Const. (1873) art. xii, § 16.

⁶ *Insurance Co. of North America v. McLimans*, (Neb. 1890) 44 N. W. Rep. 991.

be liable to be sued in the parish where the damage is done or trespass committed.¹ Where a mining corporation is authorized by law to carry on business in any county, and it conducts its principal mining operations in one county, but has an office in another, for the purpose of electing its officers and conducting its financial operations, it is within the jurisdiction of the proper court of the latter county.² Generally the petition should allege that the corporation has an agent in the county, and the question of the relation of agency may be proved by acts or agreements constituting such a relation.³ Where a complaint by a corporation in foreclosure fails to show that it filed its articles of incorporation in the county where the property to be foreclosed was situated, before suit, as provided by the code, its failure so to do is a matter of abatement to be specially pleaded, otherwise it is waived.⁴

§ 859. **Service of corporations.**—Service of summons must be upon the identical agent provided by statute; and if a general agent is designated, service upon a foreman is not sufficient.⁵ Accordingly under an act providing that personal service of a summons on a domestic corporation shall be by delivering a copy to the treasurer, among others, service on an assistant treasurer, holding none of the enumerated positions, is irregular and void.⁶ A sheriff's return, showing service on a person designated by name "as president" of a certain company, "who is the owner of said goods," is sufficient to show service on the company.⁷ A return upon a summons, which states that a copy was left with the book-keeper and agent of the company, naming him, at the only office of the company in the county, said book-keeper being in charge thereof, is sufficient, under an act which provides that, in the absence

¹ *Caldwell v. Vicksburg &c. R. Co.*, (1888) 40 La. Ann. 753, construing La. Code Prac. art. 165, subd. 9.

² *Dade Coal Co. v. Haslett*, (1890) 83 Ga. 549.

³ *Bradstreet v. Gill*, (1888) 72 Tex. 115; s. c. 13 Am. St. Rep. 768.

⁴ *Ontario State Bank v. Tibbits*, (1889) 80 Cal. 63, construing Cal. Civ. Code, § 299.

⁵ *Great Western Mining Co. v. Woodmas of Alston Mining Co.*, (1888) 12 Colo. 46; s. c. 13 Am. St. Rep. 204.

⁶ *Winslow v. Staten Island &c. R. Co.*, (1888) 2 N. Y. Supl. 682.

⁷ *Grand Rapids Chair Co. v. Runnels*, (Mich. 1890) 43 N. W. Rep. 1006.

of the president or chief officer, a summons against an incorporated company may be served by leaving a copy thereof at any business office of said company, with the person having charge thereof.¹ The failure to show, in the return on a summons served upon a corporation, that service was had in the county where the company kept its principal office or carried on its principal business, does not render the return defective; the law in force at the time of service not containing those requirements.² Having recognized or taken advantage of a service, the corporation can not afterward complain of it.³ But where the representative of a railroad corporation is served with process, he may plead in abatement in his own name that the corporation is extinct, or he may make the same defense by motion to dismiss the suit, or by suggestion of his attorney of record, supported by affidavit showing the facts.⁴

§ 860. Averments necessary in suits by corporations.—

In a suit by a corporation it is unnecessary to allege every fact essential to the existence of the corporation.⁵ And an allegation that the plaintiff is a body duly and legally incorporated by and under the laws of the State is sufficient under a statute providing that in pleading the charter or act of incorporation it shall be sufficient to allege that the corporation was duly incorporated.⁶ But a corporation may be required to state whether it is a domestic or foreign corporation.⁷ And in that case it is sufficient if the complaint alleges that it was created first under the statutes of other States, and also under a specified chapter of the laws of the State of the forum.⁸ A complaint by a corporation for the enforcement of a contract made by it with the defendant, need not allege that it was empowered to make the contract.⁹ For an allegation by a

¹ *Hill v. St. Louis &c. Co.*, 90 Mo. 103.

² *Tabor v. Goss &c. Manuf. Co.*, (1888) 11 Colo. 419.

³ *Lewis v. Glenn*, 84 Va. 947; *Presstman v. Mason*, 68 Md. 78.

⁴ *Kelley v. Mississippi Central R. Co.*, 2 Flip. C. Ct. 581.

⁵ *Washer v. Allensville &c. Co.*, 81 Ind. 78.

⁶ *Texas &c. Ry. Co. v. Virginia Ranch &c. Co.*, (Tex. 1888) 7 S. W. Rep. 341.

⁷ *National Temperance Soc. &c. v. Anderson*, (1888) 2 N. Y. Supl. 49.

⁸ *American &c. Soc. v. Foote*, (1889) 52 Hun, 307.

⁹ *St. Paul Land Co. v. Dayton*, (1887) 37 Minn. 364.

corporation that plaintiff and defendant entered into an agreement to and with each other, includes and implies the plaintiff's capacity and power to make the agreement.¹ And again, where the incorporation is not by public act, and the corporation sues upon a contract not made in the name by which it sues, the fact of incorporation should be averred, and on a general denial it should be proved, yet after a verdict in the corporation's favor it will be presumed to have been conceded or proven.²

§ 861. Verification of corporate pleadings.—Corporations must plead as to facts practically as individuals. Thus although a corporation can not be compelled to answer to a bill in equity, under oath, it can be required to answer, and must answer fully.³ So also, generally, in a suit against a corporation, the answer should be made by the principal officer of the corporation, who should be able to admit or deny the facts charged and questions put, or to state want of knowledge clearly and truly as a reason for not doing either.⁴ And again a verification to a complaint made by an officer of a corporation, need not set forth "his knowledge, or the grounds of his belief on the subject, and the reasons why it was not made by the party;" for a corporation acts only through its officers and agents; and his verification is the verification of the corporation itself.⁵ And under a statute which provides for the oral examination of a garnishee, and applies the provision to corporations, a corporation must answer by an officer who can answer knowingly.⁶ But in an action against a corporation, an answer verified by its treasurer denying, upon information and belief, each and every allegation of the complaint creates an issue of fact, which must be disposed of by a trial.⁷ Under a statute requiring the pleadings of domestic corporations to be verified by an officer thereof, a verification by one

¹ *La Grange Mill Co. v. Bennewitz*, 28 Minn. 62.

² *Girls' Industrial Home v. Fritchey*, 10 Mo. App. 344.

³ *Gamewell &c. Co. v. Mayor*, (1887) 31 Fed. Rep. 312.

⁴ *Hale v. Continental Life Ins. Co.*, 16 Fed. Rep. 718.

⁵ *Commercial Bank v. Hutchison*, 87 N. C. 22.

⁶ *Ex parte Cincinnati, Selma &c. Ry. Co.*, 78 Ala. 258, construing Ala. Code, §§ 3293, 3267.

⁷ *Macauley v. Bromell &c. Co.*, 67 How. Pr. 252; s. c. 14 Abb. N. C. 316.

who stated in the affidavit that he was the former president of the defendant corporation; that all the officers, including himself, had tendered their resignations; and that no other officers have yet been elected or chosen in their places, is insufficient.¹ And under the same law, the answer of a defendant domestic corporation, which is verified by one who simply affirms that he is "general manager" thereof, stating nothing in regard to his duties, is defective, although by another subdivision of the section service might be made upon the managing agent.²

§ 862. Necessary allegations in complaints against corporations.—An allegation in the petition that a defendant is a private corporation is sufficient without alleging by what authority it was incorporated.³ And a complaint against a railroad company designating it by its corporate name, need not allege its corporate capacity.⁴ So also in an action against the Adams Express Company, it is not necessary to specifically aver that it is a corporation; its name imports that such is the case.⁵ And a complaint which alleges that defendant is a corporation, but which fails to allege whether it is a foreign or domestic corporation, is not demurrable, as not stating facts sufficient to constitute a cause of action.⁶ Where there is an allegation of the corporate existence in the complaint before the causes of action, it is unnecessary that it should re-appear in each averment of a cause of action.⁷ But it has been held in California that an averment of the defendant's corporate existence is necessary in every count of a complaint against a corporation.⁸ A complaint, in an action against a corporation for services, alleging that plaintiff was employed by defendant through its secretary,

¹ *Kelly v. Woman Pub. Co.*, (1888) 4 N. Y. Supl. 99, construing N. Y. Code Civ. Proc. § 525, subd. 1.

² *Meton v. Isham Wagon Co.*, (1888) 4 N. Y. Supl. 215.

³ *Houston & Co. v. Kennedy*, (1888) 70 Tex. 233.

⁴ *Stanly v. Richmond & Co. R. Co.*, 89 N. C. 331.

⁵ *Adams Ex. Co. v. Harris*, (1889) 120 Ind. 73.

⁶ *Rothchild v. Grand Trunk Ry. Co.*, (1890) 10 N. Y. Supp. 36.

⁷ *West v. Eureka Imp. Co.*, (1889) 40 Minn. 394.

⁸ *People v. Central Pac. R. Co.*, (1890) 83 Cal. 393; *People v. California Pac. R. Co.*, (Cal. 1890) 23 Pacif. Rep. 310; *Loup v. California & Co. R. Co.*, 63 Cal. 99.

naming him, need not aver the secretary's authority to bind the corporation.¹ A complaint stating the full amount of capital stock, and the amount subscribed by four stockholders, joined with the corporation as defendants, does not imply that all the stockholders were joined, or that the stock subscribed by them was the total amount subscribed; and therefore the fact that all the capital stock was not subscribed, not appearing in the complaint, can not be reached on demurrer, but must be pleaded in defense.² In another case the complaint averred that the defendant claimed to be an existing corporation by virtue of and under the provisions of several statutes, which it enumerated. The original act authorized a corporation for the transmission of letters and other parcels by pneumatic tubes. One of the amendatory acts authorized it to construct and operate a railway by means of tubes of enlarged diameter. The complaint also averred that the corporation could not avail itself of the benefits of this act through its failure to construct the portions of the railway required by the act to be constructed within a specified time. And, under these averments, it was held that the plaintiffs could not, on demurrer to the complaint, avail themselves of the objection that the act had become inoperative by reason of the failure of the corporation to accept its provisions.³

§ 863. **Allegations of agents' authority unnecessary.**—As a corporation can act only by its agents, in an action against it for a breach of contract, it is sufficient to aver that the corporation made the contract.⁴ Accordingly a complaint which alleges a contract made by a corporation *in hæc verba*, purporting to be signed by the president of the company, need not aver the authority of the president to make the contract, the want of authority being matter of defense.⁵ An allegation of that character sufficiently shows, as against demurrer, that the president was authorized to make the contract.⁶ In

¹ *Sullivan v. Grass Val. &c. Co.*, (1888) 77 Cal. 418.

⁴ *Rochester v. Shaw*, 100 Ind. 268; *Sullivan v. Grass Val. &c. Co.*, 77 Cal. 418.

² *Tabor v. Goss &c. Manuf. Co.*, (Colo. 1888) 18 Pacif. Rep. 537.

⁵ *Malone v. Crescent City &c. Co.*, (1888) 77 Cal. 38.

³ *Bailey v. New York &c. Ry. Co.*, (1888) 1 N. Y. Supl. 304, following *Astor v. New York &c. Ry. Co.*, (1888) 48 Hun, 562.

⁶ *St. Paul Land Co. v. Dayton*, (1887) 37 Minn. 364.

order to interpose as a defense a want of authority in the president to enter into the contract, according to the statutory requirements, the facts must be pleaded.¹ The validity of the acts of its officers *de facto* can not be impeached by the corporation.²

§ 864. **Misnomer.**—A corporation, like an individual, may be known by more than one name, and can only take advantage of a misnomer by plea in abatement.³ But services rendered one company can not be recovered for in a suit against a company of a similar name on the assumption that the two are virtually one, without allegation and proof of the identity.⁴ The fact that a corporation has changed its name, without any change in its membership, is no defense to an action instituted against it under its former name.⁵ And where an incorporated company attempted to change its name, but failed through non-compliance with the method prescribed by statute, and afterwards obtained a judgment in the new name, objection can not be made after judgment, if the complaint stated facts which identified the company.⁶ A statute providing that actions are not abated by death or disability of a party, does not apply to corporations which have consolidated.⁷ A corporation, after having appeared in and defended an action against it under an erroneous name, and instituted proceedings in another court under the same name, can not,

¹ Kenner v. Lexington Manuf. Co., 91 N. C. 421.

² Hackensack Water Co. v. De Kay, 36 N. J. Eq. 548.

³ Louisville & N. R. Co. v. Reidmond, 11 Lea, 205.

⁴ McGregor v. Fuller & Co., (1887) 72 Iowa, 464.

⁵ Welfley v. Shenandoah & Co., 83 Va. 768.

⁶ King v. Ilwaco Ry. & Nav. Co., (Wash. 1890) 23 Pacif. Rep. 924.

⁷ Kansas, O. & T. Ry. Co. v. Smith, (Kan. 1888) 19 Pacif. Rep. 636, construing Kan. Civ. Code, § 40. But under a law which provides that no action to which the old corporation was a party shall be abated by reason of

consolidation pending suit, but that the cause shall proceed as if the consolidation had not taken place, or that the new corporation shall be substituted by order of court, it was held on motion to dismiss a bill filed by a corporation subsequently consolidated, on the ground that plaintiff's corporate existence was terminated by the consolidation, and that a bill of review was necessary, and on counter-motion to substitute the consolidated corporation, that the suit did not abate, and that the latter motion should prevail. Edison Electric Light Co. v. Westinghouse, 34 Fed. Rep. 232.

after the lapse of several years, have the decree opened and all the proceedings against it set aside on account of the misnomer.¹

§ 865. **Actions against corporations on notes.**—The code of New York provides that in an action against a corporation to recover damages for the non-payment of a promissory note, unless the defendant serves together with a copy of his answer or demurrer, a copy of an order of a judge directing that the issues presented by the pleadings be tried, the plaintiff may take judgment, as in case of default. This law, however, has no application to an answer served by a corporation in a suit brought against it as indorser.² But an action against a domestic corporation by an indorser of its accommodation paper, to recover for payment of protested notes, is within the statute.³ And when a corporation is sued upon a note, and fails to serve with its answer an order of court directing a trial, as required by the New York code, the plaintiff can have judgment entered without making application to the court.⁴ Declarations of the president of a corporation that a note indorsed to it long before, and on which suit had been brought six months before, was not corporate property, but indorsed only that suit might be brought in the United States court, are not admissible, without any showing that the president had authority to make the declarations or had some duty in the premises, or was held out as the officer to whom application for information should be made.⁵

§ 866. **Corporate existence and powers not to be collaterally attacked.**—A person who has contracted with a *de facto* corporation, and received the benefit of his contract, can not afterwards object that it was never legally organized, or that the law under which it was organized is unconstitutional.⁶ The validity of a corporate charter can not be

¹ Bate Refrigerating Co. v. Gillett, 31 Fed. Rep. 809.

² Shorer v. Times &c. Co., (1890) 119 N. Y. 483; s. c. 53 Hun, 88, construing N. Y. Code Civ. Proc. § 1778.

³ Ford v. Binghamton &c. Co., (1890) 54 Hun, 451.

⁴ Hutson v. Morrisania Steamboat Co., 12 Abb. N. Cas. 278; s. c. 64 How. Pr. 268.

⁵ Tuthill Spring Co. v. Shaver Wagon Co., (1888) 35 Fed. Rep. 644.

⁶ Winget v. Quincy &c. Assoc., (1889) 128 Ill. 67.

questioned collaterally by those claiming adverse rights,¹ but only by the State.² Accordingly one sued by a water company for water used, can not set up, by way of defense, a defect in the organization of the corporation. The defect can be taken advantage of only by the power creating the corporation.³ And the legality of the incorporation of an acting corporation can not be questioned in an action by it on a transferable contract of which it is the equitable assignee.⁴ Neither can the right of a corporation to exercise its franchises be inquired into collaterally; as, for instance, the ownership of a wagon-road claimed by a corporation can not be inquired into in a proceeding by a third party to compel the county authorities to fix rates of toll.⁵ Nor in an action by a turnpike company for the recovery of tolls can the defense be set up that the company has not complied with the requirements of its charter, and that the road was not in a proper state when the defendant passed over it, as the company is answerable for such delinquencies only to the public, and in a public prosecution.⁶ So its capacity to hold real estate can not be attacked collaterally.⁷

§ 867. **Nul tiel corporation — (a) In general.**—If a plaintiff alleges itself to be a corporation, the fact need not be proved unless positively denied.⁸ When to an action by a corporation,

¹German Ins. Co. v. Strahl, 13 Phila. 512. And in an action, by a bridge company, to compel an accounting by its president and managing officer, the referee allowed defendant credit for work done and materials furnished and money advanced by him in the construction of the bridge, after the articles had been executed and filed with the recorder of the county, but before the articles were filed in the office of the Secretary of State, and it was held that although, in the absence of such filing, plaintiff did not become a corporation *de jure*, it was a corporation *de facto*, and its corporate existence could not be questioned by plaintiff in a collateral proceeding.

Grand River Bridge Co. v. Rollins, (1889) 13 Colo. 4.

²Jersey City Gas Light Co. v. Consumers' Gas Co., 40 N. J. Eq. 427.

³Boise City Canal Co. v. Pinkham, 1 Idaho, N. S. 790.

⁴Toledo & A. A. R. Co. v. Johnson, 55 Mich. 456.

⁵Weaversville &c. Co. v. Trinity County Supervisors, 64 Cal. 69.

⁶Stults v. East Brunswick &c. Co., (1887) 48 N. J. 596.

⁷Alexander v. Tolleston Club, 110 Ill. 65.

⁸Concordia Savings &c. Assoc. v. Read, (1883) 93 N. Y. 474. Generally a corporation need not allege or prove its incorporation, where its

the plea of *nul tiel* corporation in proper form is interposed, the burden is on the plaintiff to prove its corporate existence, either by producing its charter or articles of incorporation or by some admission on the part of the defendant, or by showing a state of facts that will operate as an estoppel.¹ But a person sued by a corporation can not successfully question its existence, when the statute law for such corporations and user are shown.² And under a law very generally worded, the user may be entirely in another State than the parent State, if the office is located in the latter and returns are made as provided to its Secretary of State.³ If a defendant would deny, in its answer, the fact of incorporation, the denial must be explicit in order to put plaintiff to proof.⁴ In an action against a corporation for a balance due on a contract for sale of lumber, where it admits the purchase, it can not allege that it did not make the contract because it was not organized as a corporation when the contract was executed.⁵ And where a corporation had issued a certificate of insurance sealed with its seal and signed by its president and secretary, it was estopped by its own deed to introduce evidence showing that at the time it was not fully organized.⁶ So also an answer showing the use of a corporate name, the exercise of corporate franchises, and that the plaintiff was an officer of the company and had obtained judgment against it, sufficiently shows the existence of the corporation.⁷ But a body sued as a corporation is not estopped from denying its corporate existence by reason of having done acts which might have been done equally well by an unincorporated body.⁸ In a suit for a benefit fund against an association which averred that it was unincorporated, it has been held that testimony that the asso-

want of capacity to so sue has not been raised by demurrer or answer. *Young Men's Christian Assoc. v. Dubach*, 82 Mo. 475.

¹ *Schloss v. Montgomery Trade Co.*, (1888) 87 Ala. 411; s. c. 13 Am. St. Rep. 51.

² *Miami Powder Co. v. Hotchkiss*, 17 Ill. App. 622.

³ *Moxie &c. Co. v. Baumbach*,

(1887) 32 Fed. Rep. 205, construing Me. Rev. Stat. ch. 48, § 16.

⁴ *Bengston v. Thingvalla S. S. Co.*, 31 Hun, 96.

⁵ *Williams v. Stevens Point Lumber Co.*, (1888) 72 Wis. 487.

⁶ *Independent Order v. Paine*, (1887) 122 Ill. 625.

⁷ *Johnson v. Gibson*, 78 Ind. 282.

⁸ *Kirkpatrick v. Keota United Presbyterian Church*, 63 Iowa, 372.

ciation was a corporation *de facto* was not error, although superfluous.¹ If a corporation sues, and its corporate existence is denied, the denial may be pleaded in bar as well as in abatement.² But an answer under oath that "plaintiff had not complied with the provisions of" a certain act, is not sufficiently certain for a plea in abatement, and is bad in bar for stating only conclusions.³

§ 868. (b) **Not raised by demurrer.**—A corporation's legal existence and capacity to sue can not be raised on demurrer.⁴ If corporate capacity is disputed, it should be by answer.⁵ And a failure of the complaint to allege that the plaintiff, designated as a national bank, is a corporation, as required by statute, is not a failure to state facts constituting a cause of action; and even if it fails to show legal capacity to sue, objection must be taken by answer, and not by demurrer.⁶ But failure to allege in a complaint that a party is a corporation, as required by statute, is ground for demurrer.⁷ Failure, however, of the complaint to allege compliance with a statute which provides that no corporation shall maintain or defend any action in relation to its property until it has filed a copy of its articles of incorporation with the clerk of the county in which the property is situate, does not render it demurrable where it contains no averment on the subject; the defense must be specially pleaded.⁸

§ 869. (c) **Not raised by the general issue.**—An allegation in the complaint that defendant is a corporation is not put in issue by a general denial;⁹ although some older cases hold

¹ *Jewell v. Grand Lodge*, (1889) 41 Minn. 405; *St. Anthony & Co. v. King Bridge Co.*, 23 Minn. 186; *East Norway Lake Church v. Froislie*, 37 Minn. 447.

² *Oregonian Ry. Co. v. Oregon Ry. & Nav. Co.*, 22 Fed. Rep. 245; s. c. 23 Fed. Rep. 232.

³ *Singer Manuf. Co. v. Effinger*, 79 Ind. 264.

⁴ *Irving Bank v. Corbett*, 10 Abb. N. Cas. 85; *Stanley v. Richmond & D. R. Co.*, 89 N. C. 331; *Crane & Co. Manuf. Co. v. Reed*, 3 Utah, 506.

⁵ *Stanly v. Richmond & Co. R. Co.*, 89 N. C. 331.

⁶ *Irving Bank v. Corbett*, 10 Abb. N. Cas. 85, construing N. Y. Code Civ. Proc. §§ 1775, 488, subd. 8.

⁷ *Oesterreicher v. Sporting Times Pub. Co.*, (1889) 5 N. Y. Supl. 2.

⁸ *South Yuba & Co. v. Rosa*, (1889) 80 Cal. 333, construing Cal. Civ. Code, § 299.

⁹ *Rembert v. South Carolina Ry. Co.*, (S. C. 1888) 9 S. E. Rep. 968. Where a corporation sues in a federal court it need not prove its cor-

that a corporation suing must prove its incorporation under the general issue.¹ And the corporate existence of a plaintiff corporation is not in issue under an answer which denies the plaintiff's allegations generally on information and belief.² Where an answer simply alleges that the defendant has no knowledge or information sufficient to form a belief as to whether the plaintiff is a corporation under a certain law as alleged, this is not enough to put the corporation upon proof of its corporate existence, for the language has no greater force than a general denial, and is not tantamount to an affirmative allegation that the plaintiff is not a corporation as required by the law.³

§ 870. (d) Not to be raised after verdict.—A corporation bringing suit in a justice's court is not, upon an appeal, bound to prove its corporate existence, if no objection was made, by the defendant, to its failure to do so on the trial in the court below.⁴ So also if an action is brought against a defendant by the name of the Waycross Lumber Company, and service is made on a party as president thereof, who files pleas to the declaration, an objection taken after verdict, for the first time, that the declaration did not allege that the defendant was a corporation, is not available.⁵

porate existence where defendant has pleaded the general issue only. *Union Cement Co. v. Noble*, 15 Fed. Rep. 502. So in the State courts allegations in an answer, that the plaintiff never was a corporation duly or otherwise organized under the laws of this State, nor a copartnership nor an individual, do not raise that issue. *Ontario State Bank v. Tibbits*, (1889) 80 Cal. 68. And again it has been held that pleading the general issue admits the corporate existence. *Harrison v. Martinsville &c. R. Co.*, 16 Ind. 506; s. c. 79 Am. Dec. 447. Cf. *Commercial Bank v. Pfeiffer*, 108 N. Y. 242; *Orono v. Wedgewood*, 44 Me. 49; s. c. 69 Am. Dec. 81; *West*

Winsted Assoc. v. Ford, 27 Conn. 282; s. c. 71 Am. Dec. 447.

¹ *Welland Canal Co. v. Hathaway*, 8 Wend. 480; s. c. 24 Am. Dec. 51; *Selma &c. R. Co. v. Tipton*, 5 Ala. 789; s. c. 39 Am. Dec. 344; *Harris v. Muskingum Manuf. Co.*, 4 Blackf. 267; s. c. 29 Am. Dec. 372; *Phenix Bank v. Curtis*, 14 Conn. 437; s. c. 36 Am. Dec. 492.

² *Liberian Exodus Jointstock Steam Ship Co. v. Rodgers*, 21 S. C. 27.

³ *Concordia &c. Assoc. v. Read*, (1883) 93 N. Y. 474; *Rock Island Bank v. Loyhed*, (1881) 28 Minn. 396.

⁴ *State v. New York &c. Co.*, (N. J. 1887) 8 Atlan. Rep. 290.

⁵ *Cribb v. Waycross Lumber Co.*, (1889) 82 Ga. 597.

§ 871. (e) **Estoppel.**—A person who contracts with a *de facto* corporation thereby recognizes its corporate existence and can not, in an action against him on the contract, impeach the legality of its organization.¹ Accordingly, where the defendant gave a note to the plaintiff in its corporate capacity, it was held that he had admitted that it was a duly instituted corporation.² And one who has signed the certificate of incorporation, has conveyed property to the company, and has acted as one of its officers, is estopped from denying its *de facto* existence.³ The corporate character and existence of a plaintiff in an action may even be established by proof that a defendant had contracted with it as such, having recognized the existence of a legal entity with a corporate name, and having capacity to contract.⁴ Where an effort has been made in good faith to organize a corporation under a statute, and all formalities are complied with except the filing of the certificate of incorporation with the Secretary of State, and corporate functions are assumed, there is a corporation *de facto*, and persons dealing with it as such can not allege that it is not so *de jure*, nor hold the incorporators liable as partners. For the recording of the certificate is not a condition precedent to the legal existence of the corporation.⁵ So under a statute which enacts that no person sued on a contract made with a corporation shall set up in defense want of legal organization, it was held that heirs petitioning to set aside a bequest, can not allege illegal organization against a corporation seeking to maintain the validity of the bequest.⁶ Again a party who has recognized an association claiming to be a corporation, by dealing and contracting with it, will be deemed to have admitted its legal existence in an action on contracts made upon the faith of the transactions. And where an asso-

¹Butchers' & Drovers' Bank v. McDonald, 130 Mass. 264; Cravens v. Eagle &c. Co., (1889) 120 Ind. 6; Smelser v. Mayne &c. Co., 82 Ind. 417; McCord &c. Co. v. Glen, (Utah, 1889) 21 Pacif. Rep. 500; Beekman v. New York &c. Co., 35 Fed. Rep. 3.

²Studebaker Bros. Manuf. Co. v. Montgomery, 74 Mo. 101.

³Bates v. Wilson, (Colo. 1890) 24 Pacif. Rep. 99.

⁴French v. Donohue, 29 Minn. 111; Johnston Harvester Co. v. Clark, 30 Minn. 308; Holbrook v. St. Paul &c. Co., 25 Minn. 229.

⁵Vanneman v. Young, (1890) 52 N. J. 403.

⁶Quinn v. Shields, 62 Iowa, 129, construing Iowa Code, § 1089.

ciation, or corporation, and another have assumed to enter into a partnership and have done business jointly, they may recover upon obligations made to them in their partnership name, irrespective of their rights and duties as between themselves, or the power of the association to execute the powers incident to a partnership.¹

§ 872. (f) A “company” *prima facie* a corporation.—Where a party sues and obtains judgment under a name such as would imply that it is a corporation, but without alleging the fact of its incorporation, the judgment will be sustained.² Thus a plaintiff sued under the name of the “Johnston Harvester Company,” upon a contract made under that name with the defendant, who interposed no defense in his answer, except a denial of the execution of the contract, and it was held that no proof of incorporation was necessary, and that the justice’s judgment should not be set aside for want of that proof.³ Furthermore, under laws making trustees of the Methodist Church a body corporate, and nothing appearing to the contrary, plaintiffs, who sue in their individual names as trustees of the Barstow-Street Methodist Episcopal Church, are presumed to have been lawfully incorporated.⁴ But it has been held that, where individuals sued by their own names, “as trustees of the Printing Establishment of the United Brethren in Christ,” which was averred to be a corporation, the individuals, and not the corporation, were the real plaintiffs.⁵ It should generally be left to the court as a matter of law to determine whether or not the name in which a party sues is such as to imply its incorporation.⁶

§ 873. Evidence of corporate existence — (a) Certificates and copies.—The original record of incorporation is admissible to prove the fact of incorporation, as well as the letters of incorporation,⁷ and a copy of the articles of association of

¹ French v. Donohue, 29 Minn. 111.

⁵ Rike v. Floyd, (1890) 42 Fed. Rep.

² St. Cecilia Academy v. Hardin, 247.

(1887) 78 Ga. 39.

⁶ St. Cecilia Academy v. Hardin,

³ Johnston Harvester Co. v. Clark, 30 Minn. 308.

(1887) 78 Ga. 39.

⁷ State v. Abernathy, 94 N. C. 545.

⁴ Skinner v. Richardson, (1890) 76 Wis. 464.

a corporation, filed in the county recorder's office, when officially certified to as a full, true, and complete copy from the record, is admissible as evidence of the original articles which have been lost.¹ A copy of the organization certificate of a bank, certified and sealed by the comptroller of the currency, is sufficient evidence of the corporate existence of the bank.² But a paper lacking three or four of the essentials for a paper declared by statute to serve as proof of corporate organization, can not be received in proof thereof.³ Where, at the trial, the admission of articles of incorporation is objected to as immaterial, irrelevant and incompetent evidence, the specific objection on appeal that the articles were not sufficiently authenticated to render them admissible, and that the certificates were made by deputy officers, will not be considered.⁴

§ 874. (b) **Performance of corporate acts.**— Generally "it may be safely relied on as a sound proposition, that, when an association of persons have for a long time acted as a private corporation, have been uniformly recognized as such, and rights have been acquired under them as a corporation, the law will countenance every presumption in favor of their legal corporate existence, at least, unless against the sovereign."⁵ The execution of a note and deed to a corporation is *prima facie* proof of the existence of the corporation, by way of estoppel to deny it.⁶ Where it appears that plaintiff was recognized in the community as a corporation, its records show that it was acting as such, and in all its dealings was so styled; that it had held corporate meetings, and pursued corporate forms of action, sufficient is shown to bring it within a statute which declares that the due incorporation of any company claiming in good faith to be a corporation, and doing business as such, shall not be inquired into collaterally

¹ Walker v. Shelbyville &c. Turnpike Co., 80 Ind. 452.

² Rock Island Bank v. Loyhed, 28 Minn. 396.

³ Baptist Church v. Baltimore &c. R. Co., 4 Mackey, (D. C.) 43.

⁴ Noonan v. Caledonia Gold Min. Co., (1887) 121 U. S. 393.

⁵ Angell & Ames on Corporations,

(11th ed.) § 70, citing Hagerstown Turnpike v. Creeger, 5 Harris. & J. 122; Shrewsbury v. Hart, 1 Car. & P. 118; Dillingham v. Snow, 7 Mass. 547; Stockbridge v. West Stockbridge, 12 Mass. 400; Bow v. Allentown, 34 N. H. 351.

⁶ Brown v. Scottish American Mortgage Co., 110 Ill. 235.

in any private suit to which such *de facto* corporation may be a party.¹ But if the acts of a company or association, however long its standing, are such only as might be performed by an unincorporated company, corporate existence will not be presumed therefrom.² Thus the fact that the business of a company is conducted by a president and secretary raises no presumption of incorporation.³

§ 875. (c) **Of foreign corporations.**—A copy of an act to incorporate a foreign corporation, to which is appended the certificate of the Secretary of the State of the corporation's origin with the seal of the State affixed, is admissible to show the existence of the corporation.⁴ And proof that a company attempted an organization under the general statute of another State, and transacted business as a corporation *de facto*, the certificates of its shares of stock reciting that it was organized under the general laws of that State, is sufficient, in the absence of anything to the contrary, to authorize a finding that the company was duly incorporated, in a case in which the fact is only collaterally in issue.⁵ So also the records, books and minutes embracing the proceedings in the organization of a company under and in pursuance of its charter, when regular and identified by the person authorized to make them, are *prima facie* evidence of its organization and corporate existence.⁶

§ 876. **Production of corporate books.**—The law as to the production of corporate books as evidence, does not appear to be well settled. It has been said, however, in a case to which the corporation was not a party, that "No authority is found in any of the federal courts denying the right to compel corporations to produce evidence which may be necessary and vital to the rights of the litigants. On principle, it is impossible to suggest any reason why a corporation should be privileged to withhold evidence which an individual would be required to produce. It may be inconvenient and sometimes

¹ *Lakeside Ditch Co. v. Crane*, (1889) 80 Cal. 181, construing Cal. Civ. Code, § 358.

² *Greene v. Dennis*, 6 Conn. 302; *Ernst v. Bartle*, 1 Johns. Cas. 319.

³ *Clark v. Jones*, 87 Ala. 474.

⁴ *Pacific Guano Co. v. Mullen*, 66 Ala. 582.

⁵ *Barrett v. Meade*, 10 Allen, 337.

⁶ *Glenn v. Orr*, (1887) 96 N. C. 413.

embarrassing to the managers of a corporation to require its books and papers to be taken from its office and exhibited to third persons, but it is also inconvenient and often onerous to individuals to require them to do the same thing. Considerations of inconvenience must give way to the paramount right of litigants to resort to evidence which may be in the power of witnesses to produce, and without which grave interests might be jeopardized and the administration of justice thwarted."¹ And a motion by a depositor for an order compelling a defendant bank to permit an inspection of its books, was allowed, where it was made to appear that the plaintiff could not obtain the information sought otherwise than by inspection.² But usually a corporation can not be compelled to produce its books when it is not a party to the suit.³ The New York Code of Procedure, however, provides that "the production upon a trial, of a book, or paper, belonging to, or under the control of a corporation a party to the suit, may be compelled, in like manner, as if it was in the hands or under the control of a natural person. For that purpose a *subpœna duces tecum*, or an order made as prescribed in the code, as the case requires, must be directed to the president or other head of the corpo-

¹ Wallace, J., in *Wertheim v. Continental Ry. & Trust Co.*, 15 Fed. Rep. 716.

² *Justice v. Bank*, 83 N. C. 8. So also it has been held under the Companies Clauses Consolidation Act, 1845, that a party who had recovered judgment against a corporation was not precluded from issuing execution against the shareholders who had not paid for their shares, although lands of the company have been delivered in elegit, if the proceeds of the lands be insufficient to satisfy the debt. And that, therefore, a *mandamus* should issue commanding the company to give the creditor inspection of the register of shareholders. *Queen v. Derbyshire &c. Ry. Co.*, 3 El. & Bl. 784.

³ *La Farge v. La Farge Ins. Co.*, 14 How. Pr. 26; *Morgan v. Mor-*

gan, 16 Abb. Pr. (N. S.) 291; *Bank of Utica v. Hilliard*, 5 Cow. 419. For, it is said: "Where a corporation is not a party to the action, no power of enforcing an examination or production of its books and papers is afforded on a trial between other parties. Nor can its agents or officers, in their individual capacities, be compelled to produce the books of the corporation over which they have no absolute control." And, "Even in a case of an action, in which a corporation is a party, the production of its books cannot be enforced by *subpœna duces tecum* served on its officers, that can only be effected by way of discovery under the provisions of the revised statutes." *Morgan v. Morgan*, 16 Abb. Pr. (N. S.) 291.

ration, or to the officer thereof in whose custody the book or paper is.”¹ But this does not authorize an order in the nature of a *subpœna duces tecum* to the directors of a defendant corporation. They are not “parties.”² A clerk of a bank can not be compelled to produce the books of the bank, because he is a mere servant of the corporation and the books are not in his possession or under his control.³ And a court refused to grant an attachment against a secretary and solicitor of a railway company, on the ground that he was nothing more than the servant of the directors, and as such had no authority to produce the books.⁴

§ 877. **Production of books of foreign corporations.**—The provision of the New York code in respect to the production of its corporate records in suits to which the corporation is a party, is held to apply to foreign corporations keeping their books within that State;⁵ although, if the books are out of the State, officers in the State can not be required under this provision to produce them.⁶ In any case an order for inspection before a referee, of books of a corporation in a distant State, should merely direct a delivery of sworn copies within a reasonable time.⁷ The New Jersey statute giving the courts of that State authority to require a foreign corporation to bring its books into the State, does not give the courts authority to require a foreign corporation to bring in all its papers and memoranda.⁸

¹ N. Y. Code Civ. Proc., § 868.

² *Boorman v. Atlantic & C. Ry. Co.*, 17 Hun, 555.

³ *Bank of Utica v. Hilliard*, 5 Cow. 133.

⁴ *Crowther v. Appleby*, L. R. 9 C. P. 27.

⁵ *In re Sykes*, 10 Ben. 162, construing N. Y. Code Civ. Proc. § 868.

⁶ *United States v. Tilden*, 18 Alb. L. J. 416.

⁷ *Ervin v. Oregon Ry. & Nav. Co.*,

22 Hun, 566; *Bas v. Steele*, 3 Wash.

381; *Bank of U. S. v. Wilson*, 3 Cr. C. C. 213; *Tuttle v. Mechanics'*

Bank, 6 Whart. 216; *Humphrey v. Coleman*, 1 Blackf. 199; *Rose v.*

King, 5 S. & R. 241; *Arrott v. Pratt*, 2 Whart. 566; *Gilpin v. Howell*, 5

Pa. St. 41; *Willis v. Bayley*, 19 Johns. 268.

⁸ *Huyler v. Cragin Cattle Co.*, (1887) 42 N. J. Eq. 139.

CHAPTER. XLIII.

SHAREHOLDERS' ACTIONS AGAINST AND IN BEHALF OF THE CORPORATION.

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| <p>§ 878. Introductory — Shareholders' right to sue on behalf of the company.</p> <p>879. Shareholders' right to defend on behalf of the company.</p> <p>880. Shareholders' actions against the company.</p> <p>881. Shareholders' actions against directors, officers and agents.</p> | <p>§ 882. The same subject continued — The corporation a necessary party.</p> <p>883. Suits by a single shareholder.</p> <p>884. The shareholders' necessary interest.</p> <p>885. Shareholders should request directors to sue.</p> <p>886. The same subject continued.</p> <p>887. Acquiescence and delay.</p> |
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§ 878. Introductory — Shareholders' right to sue on behalf of the company.— Every litigation on the part of a company should be in the name of the company if it really desires to engage therein.¹ Accordingly one who becomes the owner of all the capital stock of a corporation, does not thus entitle himself to maintain, in his own name, replevin for its property.² And, generally, stockholders can not sue individually for the conversion of corporate property;³ to enforce the payment of subscriptions to the capital stock;⁴ to obtain an injunction to restrain slander of the title of property belonging to the corporation;⁵ or to remove a cloud from the title of the company's property.⁶ Where, however, the refusal of the corporate management to institute or defend legal proceedings with respect to the corporate interests partakes more of a disregard of duty than of an error of judgment, where it is a non-performance of a manifest official obligation, amounting to what the law considers a breach of trust,

¹ MacDougall v. Gardiner, (1875) 1 Ch. Div. 13.

² Button v. Hoffman, 61 Wis. 20; s. c. 50 Am. Rep. 131.

³ Tomlinson v. Bricklayers' Union, 87 Ind. 308.

⁴ Wallworth v. Holt, 4 Mylne & C. 613.

⁵ Langdon v. Hillside Coal & Iron Co., (1890) 41 Fed. Rep. 609.

⁶ Baldwin v. Canfield, 26 Minn. 43, 56.

although it may not involve an intentional moral delinquency, the stockholders have the right to interfere.¹

§ 879. Shareholders' right to defend on behalf of the company.—The right of a stockholder to defend on behalf of his company, is governed by the same principles as his right to sue on its behalf.² Accordingly he has no right to defend the company against an illegal tax;³ to appeal from a judgment rendered against it,⁴ nor to object to a compromise of an action against the company agreed to by the directors.⁵ Nor can a stockholder question a judgment against the corporation even when called upon to satisfy it personally.⁶ And in a suit against a corporation, he can not file an answer without showing that the corporation has refused to defend.⁷ So, also, a conveyance of all the capital stock of a corporation to an individual stockholder, does not entitle him to defend a suit brought against the corporation, unless the latter refuses to

¹ *Beach on Railways*, §§ 415, 416; *Dodge v. Woolsey*, 18 How. 331; *Sheridan v. Sheridan Electric Light Co.*, 38 Hun, 396. "It is admitted that according to *Gray v. Lewis*, 29 L. T. Rep. (N. S.) 12, and *Foss v. Harbottle*, 2 Hare, 261, a suit for the benefit of shareholders ought to be instituted by the company and not by a shareholder on behalf of himself and the other shareholders who take a similar view with himself. Is there any exception to that rule? Vice Chancellor Bacon suggests two: (1) Where the company can not sue, and (2) where it will not sue. He thought the difficulty in the latter case might be got over by application to the court for leave to use the name of the company." 56 L. T. 452 (1874).

² Stockholders in an old corporation, the property of which has come into the hands of a new corporation standing in the shoes of the old one, some of whom permitted their stock to be forfeited for non-payment of

assessments, some of whom never paid anything for their stock in the first place, and some of whom took part in the organization of the new corporation, and encouraged its expenditures, have no standing in court to oppose its claim to the property of the old corporation. *St. Louis &c. Co. v. Sandoval &c. Co.*, 116 Ill. 170.

³ *Dodge v. Woolsey*, 18 How. 331.

⁴ *Silk Manuf. Co. v. Campbell*, 37 N. J. 539.

⁵ *Shawhan v. Zinn*, 79 Ky. 300; *Donohue v. Mariposa &c. Co.*, 66 Cal. 317.

⁶ *Farnum v. Ballard &c. Shop*, (1853) 12 Cush. 507; *Came v. Brigham*, (1854) 39 Me. 35. *Vide supra*, § 726. Except in the case of fraud, a decree against a corporation is conclusive against a stockholder thereof, even though there was no personal service upon him. *Glenn v. Springs*, 26 Fed. Rep. 494.

⁷ *Park v. New York &c. Co.*, 26 W. Va. 486.

defend.¹ But where a bond of a corporation expressly created a lien on the corporate property, and by law the stockholders were jointly and severally liable, it has been held, in a suit against the corporation to enforce the lien, that the stockholders were properly made defendants to avoid a multiplicity of suits.² And where any fraud has been perpetrated by the directors of a company, by which the property or the interest of the stockholders is affected, they have a right to come in as parties to a suit against the company, and ask that their property shall be relieved from the effect of the fraud.³ So, also, where land of a private corporation was sold in a suit instituted by creditors for the satisfaction of their debts against the corporation, it has been held that the proceedings might be opened four years afterwards, at the instance of stockholders denying the validity of the debts under which the sale was made, and charging fraud in procuring the sale.⁴

§ 880. Shareholders' actions against the company.—Stockholders can not usually bring actions against their company, unless there has been some illegal, oppressive or fraudulent or *ultra vires* act on the part of the company or a majority thereof.⁵ Accordingly, a stockholder has no right of action against the corporation based on a depreciation in value of his stock in common with the rest of the stock.⁶ And a member of an incorporated society can not sue to have declared null and void, as illegal, certain by-laws thereof, although indirectly injurious to him in his business relations.⁷ So also a bill alleging that one class of stockholders was being favored by the company to the injury of another class, without an allegation that the rights of the latter were imminently threat-

¹ Park v. Ulster &c. Co., (1884) 25 W. Va. 108.

² Marine &c. Manuf. Co. v. Bradley, 105 U. S. 175.

³ Bayliss v. Lafayette, Muncie &c. Ry. Co., 8 Biss. C. Ct. 193.

⁴ Kirtland v. Purdy University, 7 Lea, 243.

⁵ MacDougall v. Gardiner, (1875) 1 Ch. Div. 13, citing Mozley v. Alston, 1 Ph. 790; Lord v. Copper &c. Co., 2 Ph. 740; Foss v. Harbottle, 2 Hare,

461. Acc. Graham v. Boston &c. R. Co., 118 U. S. 161, affirming s. c. 14 Fed. Rep. 753; Oglesby v. Attrill, 105 U. S. 605; Forbes v. Whitlock, (1841) 3 Edw. Ch. 446; Dale v. Grant, 34 L. J. 142.

⁶ Oliphant v. Woodburn &c. Co., (1885) 63 Iowa, 332.

⁷ Thomas v. Musical &c. Union, (1890) 121 N. Y. 45; reversing s. c. 49 Hun, 171.

ened, is no ground for an injunction restraining the first class from voting their stock, or the payment of dividends until the controversy was settled.¹ But a corporator whose membership has been denied by the corporation, may sue it to establish his right thereto.² And a petition by a stockholder to restrain his company from expending money in the operation of a road, and in the construction of other lines, in violation of the franchises of another company, has been held not to present a fictitious issue in fraud of the court.³ So also holders of scrip who accepted it under an agreement that it was to be taken for lands of the company or be redeemed in cash, may enjoin the company from re-issuing scrip retired; as the redemption of their scrip and its security would be impaired thereby.⁴ On a bill by stockholders to hold a corporation liable for mismanagement, irregularities in its formation can not be inquired into;⁵ although it has been held that a stockholder is not estopped by his subscription to deny the lawful existence of a corporation prohibited by the State constitution.⁶

§ 881. Shareholders' actions against directors, officers and agents.—The stockholders may sue the corporate directors or officers only upon the same principles that govern their suits against the corporation.⁷ Accordingly, only in cases of aggravated misconduct, will equity interfere with the acts of corporate officers.⁸ And although a shareholder in a proper

¹ *Mackintosh v. Flint &c. R. Co.*, (1887) 32 Fed. Rep. 350.

² *Tipton Fire Co. v. Barnheisel*, 92 Ind. 88.

³ *Teachout v. Des Moines &c. Ry. Co.*, 75 Iowa, 722.

⁴ *Rogers v. New York &c. Co.*, 49 Hun, 606, holding also that a complaint by scripholders against a land company for refusing to carry out its agreement to take its scrip for land, is defective if it does not state that the plaintiffs had been damaged, or that defendant had refused to receive from them scrip for lands as agreed.

⁵ *Merchants' & Planters' Line v. Waganer*, 71 Ala. 581.

⁶ *St. Louis Colonization Assoc. v. Hennessy*, 11 Mo. App. 555.

⁷ *Cicotte v. Anciaux*, (1884) 53 Mich. 227.

⁸ *Cicotte v. Anciaux*, (1884) 53 Mich. 227. After the undertaking has been under statutory powers handed over to another company in consideration of moneys which are in the control of the directors of the old company, a shareholder may maintain an action for account against the directors. *Browne & Theobald's Ry. Law*, 104, citing *Cramer v. Bird*, 6 Eq. 143. Similarly, when an act directed that a company should transfer its property to an-

case may maintain proceedings to restrain the directors from a contemplated action which is illegal and *ultra vires*, notwithstanding that all the other shareholders approve and assent to the action, an injunction will not be granted unless a clear and strong showing is made.¹ A stockholder can not hold the corporation itself liable for the negligence of its directors.² He may, however, maintain an action on behalf of the corporation against the officers for fraud, wrongs, breaches of trust and for the money of which they have fraudulently deprived the company, and the corporation may be joined as a party defendant.³ Actions against directors to compel them to the performance of their duties, must be instituted ordinarily in the name of the company,⁴ and the damages recovered belong not to the stockholders but to the corporation.⁵

other company and be dissolved, and that the money to be paid by the purchasing company should be applied in a particular way among creditors and preferential shareholders, it was held that a properly framed bill by a creditor and preferential shareholder might be sustained. *Ward v. Sittingbourne & Co. Ry. Co.*, 9 Ch. 488.

¹ Thus in an action under a statute providing that stockholders and creditors of corporations may sue the officers to compel an accounting for official misconduct, where the allegations of the complaint are that plaintiff is a creditor and stockholder of the corporation; that the president, who was one of the defendants, had appropriated property of the corporation to his own use, and intended to remove all the corporate property from the county where the corporation did business; that it had ceased to do business; and that both it and the president were insolvent, although specifically denied, an injunction against defendant's interfering with the corporate property until the trial will not be disturbed. *Hayt v. Malone*,

(1890) 9 N. Y. Supl. 877, construing N. Y. Code Civ. Proc. §§ 1781, 1782; *Du Pont v. Northern Pacific R. Co.*, 18 Fed. Rep. 467; s. c. 21 Blatchf. C. Ct. 534, which was a proceeding to restrain the directors of defendant corporation from issuing a large amount of second mortgage bonds.

² *Oliphant v. Woodburn & Co.*, 63 Iowa, 332.

³ *Beach v. Cooper*, (1887) 72 Cal. 99.

⁴ *Hersey v. Veazie*, 24 Me. 9; s. c. 41 Am. Dec. 364; *Smith v. Hurd*, 12 Met. 371; s. c. 46 Am. Dec. 690; *Taylor on Corporations*, § 615. But where the organizers of a joint-stock company put in, as a part of the capital stock, certain patent-rights, and by fraudulent puffing induced others to buy the stock at fictitious rates, it was held that, whether the buyers could set aside the sales or not, they were not entitled to gain control of the company, and pursue their remedy against the directors in the corporate name. *Flagler & Co. v. Flagler*, 19 Fed. Rep. 468.

⁵ *Dewing v. Perdicaris*, 96 U. S. 193, 198; *Smith v. Hurd*, 53 Mass. 371; s. c. 46 Am. Dec. 690; *Smith v.*

Where the plaintiffs, stockholders and owners of scrip in a land company, sued the company, and the directors thereof, to secure an accounting for land-scrip issued by the company, which was distributed among the stockholders but afterwards retired, then distributed as dividends and taken again for land of the company to the detriment of the redemption of other land-scrip, it was held that as the action was brought, not for any loss or injury to plaintiffs, but to sustain the rights of the company alone against the misconduct of its directors, the right to maintain it depended upon plaintiffs showing a misappropriation of the scrip by the directors.¹ In these cases in the nature of an accounting, the acts constituting the default of the officers need not be set forth in detail.² The fact that one of the stockholders of a corporation is offensive to the trustees and obstructive in his manner and methods, is no excuse for their neglect of the business of the corporation.³ And the fact that a stockholder has a suit pending at law against the trustees of a corporation, does not deprive him of a standing in a court of equity to set aside a purchase by trustees at a foreclosure sale of the company's property.⁴ Where directors of a railway company voted unlawfully to pay a salary, and at a subsequent meeting some of them voted to issue the company's notes for the salary, an action by the stockholders can not be maintained against those who voted to pay the salary, but did not vote for the issue and negotiation of the notes.⁵

§ 882. The same subject continued — The corporation a necessary party.— If justice to stockholders can not be attained through an action by the corporation, they may sue, making the corporation a party defendant.⁶ In all cases

Poor, 40 Me. 415; s. c. 63 Am. Dec. 672; *Evans v. Brandon*, 53 Tex. 56;

Carter v. Ford & Co., 85 Ind. 180.

¹ *Rogers v. Phelps*, (1890) 9 N. Y. Supl. 886.

² *Halsey v. Ackerman*, 38 N. J. Eq. 501, affirming 37 N. J. Eq. 356. See also *Gardner v. Pollard*, 10 Bosw. 674; 2 N. Y. Rev. Stat. 589, § 1, and 591, § 16.

³ *Raleigh v. Fitzpatrick*, (1887) 43 N. J. Eq. 501.

⁴ *Raleigh v. Fitzpatrick*, (1887) 43 N. J. Eq. 501.

⁵ *Metropolitan Ry. Co. v. Kneeland*, (1890) 120 N. Y. 134, modifying s. c. 45 Hun, 590.

⁶ *Brewster v. Hatch*, 10 Abb. N. Cas. 400. In this case, although a mining corporation was the party

where the corporation is not a party plaintiff it must be made defendant, as in proceedings to restrain the usurpation of corporate franchises;¹ in a suit against directors of a dissolved corporation for mismanagement of its affairs;² where a bill is filed to set aside a mortgage made by the corporation;³ and where a bill is filed under a statute to wind up and dissolve the company and sell its property and distribute the proceeds.⁴ A stockholder, to maintain a suit for a corporation, or for his associate stockholders, where the rights of the corporation are involved, must allege that the directors decline to bring suit or permit him to do so in the name of the corporation, and the corporation must be made a party, otherwise no cause of action appears, a necessary party not being before the court; and the defect can not be remedied by special demurrer, nor can the court require the corporation to be made a party, but the suit must be dismissed;⁵ although leave may be given to amend and to add the company as a defendant.⁶ Where, in an action by a corporation, the complaint avers that the action was commenced by a minority of the stockholders "by express consent, direction and authority of the corporation," a demurrer that it has no legal capacity to sue, because the suit was commenced without authority of the directors or a majority of its stockholders, is not well taken.⁷ It would seem that in England where a single shareholder brings an action in the name of the company, the court may direct a meeting of the company, and if a majority disapprove

primarily aggrieved, the complaint showed special damages entitling the plaintiff subscribers to maintain the action as against defendant promoters who had retained certain proceeds of a trust sale. So, where officers of a corporation have assets in their possession belonging to the corporation, the corporation, and not the stockholders, is the proper party to bring an action to compel them to account, unless it is made to appear that it is necessary for the stockholders to bring the action in order to prevent a complete failure of justice. In the latter case,

the corporation must be made a party defendant. *Byers v. Rollins*, (1889) 13 Colo. 22.

¹ *People v. Flint*, 64 Cal. 49.

² *Camp v. Taylor*, (N. J. 1890) 19 Atlan. Rep. 968.

³ *Coxe v. Hart*, (1884) 53 Mich. 557.

⁴ *Hurst v. Coe*, (1887) 30 W. Va. 158.

⁵ *Shawhan v. Zinn*, (1882) 70 Ky. 300.

⁶ *Silber Light Co. v. Silber*, 12 Ch. Div. 717.

⁷ *Lang Syne Min. Co. v. Ross*, (1888) 20 Nev. 127.

of the action, the name of the company will be struck out as plaintiff.¹

§ 883. **Suits by a single stockholder.**—A single stockholder, in a proper case, may sue for himself and others,² as when a corporation is under the control of officers who should be made defendants in a suit to investigate the mismanagement of the corporate affairs.³ So also where a company's charter was repealed by the legislature and its franchises and property transferred to another, and the company refused to seek a remedy, it was held that a stockholder asking for an injunction on the ground that the statute impaired the obligation of a contract, had a standing in equity.⁴ So again where the majority of the stockholders of a corporation are illegally pursuing a course, in the name of the corporation, which is in violation of the rights of the other stockholders, and which can only be restrained by a court of equity, an action to obtain equitable relief may be maintained by an aggrieved stockholder, and those whose rights are thus affected may join as plaintiffs in the action.⁵ And a complaint, to procure the cancellation of illegal stock, although in form in behalf of plaintiff alone, stating that other stockholders are injured, and that the stock was issued against their wishes, and praying for relief which inures to the benefit of all, is in behalf of all, and any stockholder may become a party plaintiff on application.⁶ But one who is a stockholder in two corporations can not bring suit to enjoin the owner of a controlling interest in one of them from voting at a stockholders' meeting in favor of its engaging in a certain business, on the ground that engaging therein would be an illegal interference with the rights of the other corporation.⁷ Nor can he maintain a suit to enjoin the corporation itself from engaging in

¹ MacDougall v. Gardiner, 1 Ch. Div. 13; Exeter &c. Ry. Co. v. Buller,

³ Ithaca Gas Light Co. v. Truman, 30 Hun, 212.

⁵ Rob. C. 211; East Pant Du Lead Mining Co. v. Merryweather, 13 W. R. 216; 2 H. & M. 254. See, too, Cape Breton Co. v. Fenn, 17 Ch. Div. 198.

⁴ Greenwood v. Union Freight R. Co., 105 U. S. 13.

⁵ Barr v. New York, L. E. &c. R. Co., 96 N. Y. 444.

² Ithaca &c. Co. v. Truman, 30 Hun, 212.

⁶ Wood v. Union &c. Assoc., (1885) 63 Wis. 9.

⁷ Converse v. Hood, (1889) 149 Mass. 471.

the business, on the ground that by so doing it will expose itself to vexatious and expensive litigation, and so diminish the value of plaintiff's stock.¹ Nor does he acquire the right to maintain the suit by the fact that when he subscribed for his stock he remonstrated against the corporation engaging in that business, and that the corporation and its principal stockholder thereupon agreed not to engage therein.² Where an action is thus brought in respect of an *ultra vires* act, which may affect the rights of any particular class of shareholders, that class is sufficiently represented by one of its members.³ But one can not sue on behalf of scrip and stock holders, when it is conceded that the stockholders have no cause of action.⁴ For the class which the plaintiff represents must be a class of persons having the same interest, and must not be composed of persons who have adverse claims;⁵ although if the illegal act is the act of the whole company or its executive, different classes of shareholders need not be independently represented.⁶ Under a constitutional provision that a list of the stockholders of the corporation shall be kept in its office for the inspection of stockholders and creditors, *mandamus* will not lie to compel the corporation to allow a stockholder to make a list of the other stockholders in order that they may be induced to join with him in a suit he proposes to institute against the corporation and to share with him the expenses of the suit.⁷

¹ *Converse v. Hood*, (1889) 149 Mass. 471.

² *Converse v. Hood*, (1889) 149 Mass. 471.

³ *Hoole v. Great Western Ry. Co.*, 3 Ch. 262. See *Cramer v. Bird*, 6 Eq. 143. He is entitled to sue on behalf of himself and all others similarly interested, although no member of the class besides himself may be willing to sue. *Browne & Theobald's Ry. Law*, 104, and cases there cited. But though there may be members of the class willing and entitled to sue, the suit can not be maintained if the plaintiff is person-

ally precluded from suing. *Burt v. British &c. Assoc.*, 4 De Gex & J. 158.

⁴ *Rogers v. New York &c. Co.*, (1888) 1 N. Y. Supl. 908.

⁵ *Ward v. Sittingbourne &c. R. Co.*, 9 Ch. 88.

⁶ *Browne & Theobald's Ry. Law*, 105, citing *Hoole v. Great Western Ry. Co.*, 3 Ch. 262.

⁷ *Appeal of Empire &c. Co.*, (Pa. 1890) 7 Ry. & Corp. L. J. 470; *Commonwealth v. Iron Co.*, 105 Pa. St. 111; *Buck v. Collins*, 57 Ga. 391; *Webber v. Townley*, 43 Mich. 534; *Bean v. People*, 7 Colo. 200.

§ 884. **The stockholders' necessary interest.**—A real and present interest in the stock is necessary to enable the owner thereof to bring a suit against the company. It is no objection to an action by a shareholder that he has become a shareholder for the purpose of bringing the action.¹ And a stockholder may maintain an action to set aside an election of directors, although at the time of the election no stock had stood in his name on the books of the corporation sufficiently long to entitle him to vote.² So also the original allottee, or the purchaser of scrip issued to raise funds for a particular purpose, whether he has been registered or not, may maintain an action on behalf of himself and other scripolders to restrain the company from applying the funds to other purposes, and the vendor of the scrip need not be a party.³ And again a stockholder may enjoin the misapplication of corporate funds under an agreement entered into before his stock was issued, where he had a vested right to receive it before the agreement was made.⁴ A further example of this principle is that owners of stock in a corporation have the right to enjoin the corporation from performing an *ultra vires* contract made before they became stockholders, and the right can not be defeated by the refusal of the officers to transfer the stock upon the company's books.⁵ But an action can not be maintained against a corporation by a stockholder where the bill contains no allegation that plaintiff was a stockholder at the time of the transaction complained of, or that he acquired his shares by operation of law.⁶ Neither should a corporation be

¹ *Seaton v. Grant*, 2 Ch. 459; *Ry. Co.*, 1 Hurl. & M. 489; *Browné & Bloxam v. Metropolitan Ry. Co.*, 3 Ch. 337. But see *Rice v. Rockefeller*, (N. Y. Sup. Ct. Gen. Term, 1890) 8 Ry. & Corp. L. J. 129, reviewed at length, *supra*, § 848. And a person who is indemnified by other parties, and is not *bona fide* acting in his own interest as shareholder, will not be allowed to maintain an action. *Forrest v. Manchester &c. Ry. Co.*, 7 Jur. N. S. 887; s. c. 4 De Gex, F. & J. 126; *Tilber v. London, B. & S. C. Ry. Co.*, 1 Hurl. & M. 489; *Browné & Theobald's Ry. Law*, 105.

² *Wright v. Central California Colony Water Co.*, (1884) 67 Cal. 532.

³ *Bagshaw v. Eastern Union Ry. Co.*, 7 Hare, 114.

⁴ *Hill v. Glasgow R. Co.*, (1890) 41 Fed. Rep. 610.

⁵ *Carson v. Iowa City &c. Co.*, (Iowa, 1890) 45 N. W. Rep. 1068.

⁶ *Whittemore v. Amoskeag Bank*, 26 Fed. Rep. 819; *Dannemeyer v. Coleman*, 8 Sawy. 51; *Taylor v. Holmes*, 127 U. S. 489.

enjoined from paying a debt in the mode agreed to by all of its shareholders except the plaintiff, who had not paid for his stock.¹ Nor, it would seem, may a shareholder who is a mere trustee maintain a representative action against the company;² nor the holder of a scrip certificate after he has assigned the shares mentioned in the scrip.³ And a shareholder in one company can not sue a second company to enjoin it from making an exchange of stock with a third in the stock of which his company has an equitable interest. Even if he has the right to sue for his company, it can not interfere with a company in which it holds no stock.⁴

§ 885. Stockholders should request directors to sue.—Stockholders can not sue the corporation for the purpose of remedying the wrongs committed by its officers, without first applying to the directors to interfere and put a stop to the wrongs, and a refusal by the directors to do so.⁵ Nor can they sue on behalf of the company in their own names, without showing that they have endeavored in vain to secure action on the part of the directors.⁶ And a bill by stockholders against a corporation for mismanagement, should show that plaintiffs have endeavored to secure their rights through the meetings of the corporation, and that they have solicited the use of its name to bring suit against the offending directors.⁷ Before an individual stockholder can be heard in equity to ask

¹ *Landes v. Globe Planter Manuf. Co.*, (1885) 73 Ga. 176.

² *Bagshaw v. Eastern Union Ry. Co.*, 7 Hare, 114; s. c. 2 Macn. & G. 389. See *Great Western Ry. Co. v. Rushout*, 5 De G. & S. 290.

³ *Doyle v. Muntz*, 5 Hare, 509.

⁴ *Mayor v. Denver &c. R. Co.*, (1889) 38 Fed. Rep. 197.

⁵ *Boyd v. Sims*, (1889) 87 Tenn. 771; *Hawes v. Oakland*, 104 U. S. 450; *Dimpfell v. Railroad Co.*, 110 U. S. 209. Where a corporation by a valid contract acquires a majority of the stock of another corporation, shareholders in the latter have no standing in court to restrain the acts of

the directors of the former, it not appearing that they have unsuccessfully tried, within the corporation, to get what they want, or that their interests are betrayed or jeopardized. It is not enough that the former corporation is violating its contract. *Converse v. Dimock*, 22 Fed. Rep. 573.

⁶ *Taylor v. Holmes*, (1888) 127 U. S. 489, 493; *Rothwell v. Robinson*, (1888) 39 Minn. 1; *City of Chicago v. Cameron*, 120 Ill. 447; *Park v. Ulster &c. Co.*, 25 W. Va. 108.

⁷ *Merchants & Planters' Line v. Waganer*, 71 Ala. 581.

that the transactions of the corporation, acting through a majority of its stockholders and through its directors, be interfered with and set aside, he must show that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances or action in conformity to his wishes.¹ And where a stockholder brings suit to obtain redress for grievances common to others, and to vindicate the rights of the corporation, he must show that he has made an earnest, not a simulated effort to obtain redress within the corporation, and, where time has permitted, that he has endeavored to induce the stockholders, as a body, to take action.² His bill must also set forth in detail the efforts made by him to secure, on the part of the corporation, the desired action, or it will be dismissed.³ An averment that the corporation refuses to sue is essential, and the want of it may be taken advantage of by demurrer or by objection to evidence.⁴ But in an action by a stockholder to procure the cancellation of illegal stock, the objection that the plaintiff did not, before suit, apply to the directors for relief, goes to the capacity of the plaintiff to sue, and is waived if not demurred to.⁵ If through fraudulent conspiracy the directors have refused to sue, they should be made parties defendant to the action brought by the stockholder.⁶ When a corporation has been dissolved by a foreclosure sale of its franchises, but its existence is continued by statutory provision for a term of five years, during which suit may be brought in its name to wind up its affairs, a bill by stockholders is well filed if it appears that the suit is not a collusive one, and that the plaintiffs have applied to such of the late directors as they can reach to bring the suit, but they have refused to do so. Under these circumstances the stockholders may in their individual right sue the receiver, to call him to an accounting.⁷

¹ *Dimpfell v. Ohio &c. Ry. Co.*, 110 U. S. 209.

² *Dannemeyer v. Coleman*, 8 Sawy. 51.

³ *Foote v. Cunard Mining Co.*, 17 Fed. Rep. 46; *Dannemeyer v. Coleman*, 8 Sawy. 51.

⁴ *Doud v. Wisconsin &c. Ry. Co.*, (1885) 65 Wis. 103.

⁵ *Wood v. Union Gospel Church Building Assoc.*, (1884) 63 Wis. 9.

⁶ *Slattery v. St. Louis &c. Co.*, 91 Mo. 217; s. c. 60 Am. Rep. 245.

⁷ *Lafayette Co. v. Neely*, 21 Fed. Rep. 738.

§ 886. **The same subject continued.**—Where a request that the corporation itself bring the desired suit is apparently useless, it is excused and need not be made.¹ Accordingly, where the directors of a corporation, having the authority to direct its litigation, are themselves guilty of the wrong complained of, a court of equity will interfere at the instance of the stockholders, without a demand and refusal upon the part of the directors to bring the suit.² For it would be against the plainest principles of justice to permit the perpetrators of the wrong to conduct a litigation against themselves.³ Thus an unlawful consolidation sanctioned by the directors

¹ *Doud v. Wisconsin &c. Ry. Co.*, (1885) 65 Wis. 108.

² *Davis v. Gemmell*, (1889) 70 Md. 356, 376. And where the officers of a corporation have wasted its funds, a shareholder desiring redress need not, before resorting to the courts, make a demand, which necessarily would be unavailing, on the officers to bring suit. *Kelsey v. Sargent*, (1885) 40 Hun, 150. So suit for the rescission of an illegal contract may be brought by a stockholder of an insolvent corporation without a previous demand upon the corporation to sue, if the corporation appears unable to act by reason of its directors being under the control of the persons with whom the contract was made. *Currier v. New York &c. R. Co.*, 35 Hun, 355. And where in a suit by a stockholder against a corporation of which he was a member, the declaration alleged a conversion and misapplication of money by the corporation and its president, and that the latter kept false books of account and refused to pay over money rightly due plaintiff, it was held, that a sufficient cause of action had been stated, without alleging that the corporation had refused to bring suit. *Brown v. Buffalo &c. R. Co.*, 27 Hun, 342.

³ *Davis v. Gemmell*, (1889) 70 Md. 356, 376; *Peabody v. Flint*, 6 Allen, 52; *Brewer v. Boston Theatre*, 104 Mass. 378; *Pond v. Vermont Valley R. Co.*, 12 Blatch. 280; *Salomons v. Laing*, 12 Beav. 377; *Currier v. New York &c. R. Co.*, 35 Hun, 355; *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Rothwell v. Robinson*, (1888) 39 Minn. 1. Where a stockholder filed a bill against the corporation, and all the directors thereof, and another stockholder, charging that the latter defendants had entered into a conspiracy to do an unlawful and fraudulent act, in furtherance of their individual interests, which would destroy or seriously impair the value of the property of the corporation; that the directors and their co-defendant stockholder held among themselves seven-tenths of the stock of the corporation, and that they had procured a vote, of the stockholders authorizing the directors to carry out the project, he could maintain the bill to protect his individual rights, and his suit was not to be defeated because it did not show a previous effort on his part to secure redress by an appeal to the directors or stockholders for remedial action. *Barr v. Pittsburgh Plate-Glass Co.*, (1890) 40 Fed. Rep. 412.

and a majority of the stockholders,¹ or the unlawful voting by an outside corporation of a majority of the stock of the complainant's corporation, when the former has already constituted its friends a majority of the board of the latter, may be restrained without previous request to sue.² But the fact that a majority is apparently against the party desiring to bring suit, is not sufficient to excuse failure to make a request that the corporation act in the matter.³ So also where, although a corporation has expired by lapse of time, if it still exists for the purpose of winding up; and although most of the directors are dead, if one of them survives, application should be made to him to bring the suit, or an effort should be made to call together the stockholders and obtain united action in support of a claim.⁴ An allegation that the stockholders repeatedly protested against the evils complained of, without averring that their protests were made to the directors, is entirely insufficient to authorize them to sue.⁵ Again, where two of the three directors voted against bringing any suit, alleging, as the ground for their action, that they feared they could not obtain justice in the State courts, while the third director, a non-resident, was willing to trust the local courts, upon suit brought in the federal court by him the next day

¹ *Nathan v. Tompkins*, 82 Ala. 437.

² *Mack v. DeBardlaben*, (Ala. 1890) 8 Ry. & Corp. L. J. 394.

³ Thus a stockholder can not sue the manager until he has tried to obtain his rights within the corporation, even though the manager owns a majority of the stock and elects a majority of the directors. *Allen v. Wilson*, 28 Fed. Rep. 677. And a stockholder, complaining of misconduct of the treasurer of a corporation, is not excused from applying to the directors to bring suit, before bringing it himself, by the fact that the treasurer owns the majority of the stock, though that fact does excuse him from applying to a stockholders' meeting. *Dunphy v. Travelers' Newspaper Assoc.*, (1888)

146 Mass. 495. Nor can stockholders of a company, without a like demand upon it and refusal, sue another company, which is charged with wrongfully interfering with the rights of their company, simply because a majority of their directors are stockholders to a larger extent in the defendant company than in their own, and a minority are also directors in the defendant company. *Boyd v. Sims*, (1889) 87 Tenn. 771; *Huntington v. Palmer*, 104 U. S. 482; *Gas Co. v. Williamson*, 9 Heisk. 314, 338; *Deaderick v. Wilson*, 8 Baxt. 131.

⁴ *Taylor v. Holmes*, (1888) 127 U. S. 489.

⁵ *Boyd v. Sims*, (1889) 87 Tenn. 771.

after the vote, it was held that the refusal was not so clearly real and persistent as to give him authority to sue on behalf of the corporation.¹

§ 887. **Acquiescence and delay.**—The right to restrain corporate acts ceases when the members have consented to the will of the majority.² Acquiescence and the receipt of money from the corporation by reason of the illegal acts, will prevent the stockholder from impeaching its legality.³ Consent may be either express or inferred from the acquiescence of the shareholders after full knowledge of the transaction,⁴ or it may be implied by their silence for a long period of time.⁵ Accordingly, to maintain a bill for fraud, conspiracy or *ultra vires* acts, against the corporation, its officers and others who participate therein, the stockholders must act promptly or forfeit their right to equitable relief.⁶ They can

¹ *Detroit v. Dean*, 106 U. S. 537. *Acc. Hawes v. Oakland*, 104 U. S. 450; *Huntington v. Palmer*, 104 U. S. 482. In a case where the only effort appearing to have been made to induce the corporation to assert its rights consisted of a written demand sixteen days before suit brought, and where the facts justified the inference of an attempt by a simulated arrangement to foist upon the federal court jurisdiction of a case not belonging to it, the court refused to consider the complaint. *City of Quincy v. Steel*, (1887) 120 U. S. 214.

² *Leo v. Union Pacific Ry. Co.*, 19 Fed. Rep. 283. Where a stockholder buys into a railroad corporation, with knowledge that it is acting on an assumed power to invest in the stock of railroad corporations outside the State of its creation, his purchase under these circumstances will be regarded as an implied recognition of the assumed power. *Venner v. Atchison &c. R. Co.*, 28 Fed. Rep. 581.

³ *Alexander v. Searcy*, (1889) 81 Ga. 536; s. c. 12 Am. St. Rep. 337.

⁴ *Evans v. Smallcombe*, L. R. 3 H. L. 249, affirming L. R. 3 Eq. 769.

⁵ *Allen v. Wilson*, 28 Fed. Rep. 677; *Graham v. Boston &c. R. Co.*, 118 U. S. 161; *Pneumatic Gas Co. v. Berry*, 113 U. S. 322; *Kitchen v. St. Louis &c. R. Co.*, 69 Mo. 224; *International &c. R. Co. v. Bremond*, 53 Tex. 96; *Royal Bank v. Grand Junction R. Co.*, 125 Mass. 490; *In re Pinto &c. Co.*, 8 Ch. Div. 273; *In re Magdalena &c. Co.*, 6 Jur. N. S. 975; *Harwood v. Railroad Co.*, 17 Wall. 78; *Badger v. Badger*, 2 Wall. 87; *Boardman v. Lake Shore &c. Ry. Co.*, 84 N. Y. 157; *Rochdale Canal Co. v. King*, 2 Sim. N. S. 89; *Shelden &c. Co. v. Eickemeyer &c. Co.*, 90 N. Y. 607; *Alexander v. Searcy*, (1889) 81 Ga. 536; *Gifford v. New Jersey R. Co.*, 10 N. J. Eq. 171; *Boston &c. R. Co. v. New York &c. R. Co.*, 13 R. I. 260; *Ashhurst's Appeal*, 60 Pa. St. 290.

⁶ *Alexander v. Searcy*, (1889) 81 Ga. 536; s. c. 12 Am. St. Rep. 337; *Dimpfell v. Ohio &c. R. Co.*, 110 U. S. 209; *Peabody v. Flint*, 88 Mass. 54; *Dumphy v. Travelers' Newspaper*

not, however, be charged with acquiescence by remaining still while some of their number are seeking to impeach the transactions.¹ The weight which is due to mere lapse of time, varies with the extent of the interests involved, and the circumstances of each particular case.²

Assoc., (1888) 146 Mass. 495; Metropolitan Elevated Ry. Co. v. Manhattan Elevated Ry. Co., 11 Daly, 373; s. c. 14 Abb. N. Cas. 103; Zabriskie v. Hackensack &c. R. Co., 18 N. J. Eq. 178; Ashhurst's Appeal, 60 Pa. St. 290; McLoughlin v. Detroit &c. Ry. Co., 8 Mich. 100; Spackman v. Evans, L. R. 3 H. L. 171; Downes v. Ship, L. R. 3 H. L. 343; Gray v. Chaplin, 2 Russ. 136; Zabriskie v. Cleveland &c. R. Co., 23 How. 381; Hervey v. Illinois &c. Ry. Co., 28 Fed. Rep. 169; Thompson v. Lambert, 44 Iowa, 239; Vigers v. Pike, 8 Clarke & F. 562, 650; Graham v. Birkenhead &c. Co., 2 Macn. & G. 146;

Great Western Ry. Co. v. Oxford &c. Ry. Co., 3 De Gex, M. & G. 341; Aurora &c. Soc. v. Paddock, 80 Ill. 263; Stewart v. Erie &c. Transportation Co., 17 Minn. 372; Gregory v. Patchett, 33 Beav. 595; Brotherhood's Case, 31 Beav. 365.

¹ Metropolitan Elevated Ry. Co. v. Manhattan Elevated Ry. Co., 11 Daly, 573; s. c. 14 Abb. N. Cas. 103.

² Beach on Railways, § 414, citing Great Western Ry. Co. v. Oxford &c. Ry. Co., 3 De Gex, M. & G. 341; Houldsworth v. Evans, L. R. 3 H. L. 263. *Acc.* Mills v. Central R. Co., 41 N. J. Eq. 6.

CHAPTER XLIV.

ACTIONS BY AND AGAINST FOREIGN CORPORATIONS.

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| <p>§ 888. Introductory—Citizenship.
889. Service of process.
890. The same subject continued—
 “Doing business” construed.
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§ 888. **Introductory — Citizenship.**— A corporation created by a State is a citizen of that State within the meaning of the constitution and statutes defining the jurisdiction of the federal courts,¹ even if all its business is transacted elsewhere, and all of its offices and places of business are outside of the State.² And the members of a foreign corporation, where it sues or is sued in a United States court, are conclusively presumed to be citizens of the State or country which created it.³ An allegation that a corporation is doing business in a certain State does not necessarily import that it was created by the

¹ *State of Wisconsin v. Pelican Ins. Co.*, (1888) 127 U. S. 265. Where a citizen of Louisiana brings suit in the State court against a corporation, alleging that defendant is incorporated under the laws of the State, an affidavit for removal to the federal court, on the ground of diverse citizenship of the parties, which merely alleges that the corporation is a citizen of another State, and does not allege that the corporation is not domiciled in Louisiana, is insufficient. *Guinault v. Louisville &c. R. Co.*, (La. 1890) 6 So. Rep. 850.

² *Pacific R. Co. v. Missouri Pacific Ry. Co.*, (1885) 23 Fed. Rep. 565.

³ *National S. S. Co. v. Tugman*, 106 U. S. 118. A corporation can not acquire a residence in a State other than one in which it is incorporated, within the meaning of the act of congress which provides that, “when the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either plaintiff or defendant.” *Booth v. St. Louis &c. Manuf. Co.*, (1889) 40 Fed. Rep. 1.

laws of that State and is a citizen thereof.¹ So also the buying and making use of property by a corporation in another State than that in which it was incorporated, under enabling acts of that State, does not make it a corporation of the latter.² It has been decided that a corporation created by the consolidation of several corporations existing in different States, by an act of the legislature, which provided that it should be treated as a corporation created by the laws of the State authorizing the consolidation, is, as concerns a suit against it by an alien, a citizen of that State, and not entitled to a removal of the suit under the local prejudice clause of the Removal of Causes Act.³ And when the charter of a corporation in one State is duplicated in another State, and the legislature assumes to create a home corporation, the effect is to consolidate the two; but for purposes of jurisdiction it is a separate corporation within the State of its adoption. In such a case separate organization is not necessary.⁴

§ 889. **Service of process.**—Valid service upon foreign corporations may be made upon their managing agents, under the New York code.⁵ In that State a general agent of the passenger department of a foreign railway, may be served with process intended for the corporation.⁶ And in a local action for penalties for stamping articles as patented, without license, recoverable only in the district where the stamping is done, an agent of a foreign corporation who has the general management and control within the district of the manufacturing business in the course of which the stamping is done, is a “managing agent” of the corporation within the meaning of the code, and service upon him is a valid service upon the corporation.⁷ So also service upon a managing agent for a State of a foreign corporation, is sufficient under acts providing that service may be made upon local agents in the

¹ *Brock v. Northwestern Fuel Co.*, (1889) 130 U. S. 341.

² *Wilkinson v. Delaware &c. R. Co.*, 22 Fed. Rep. 353.

³ *Cohn v. Louisville &c. R. Co.*, 39 Fed. Rep. 227.

⁴ *Blackburn v. Selma &c. R. Co.*, 2 Flip. 525.

⁵ *E. g.* N. Y. Code Civ. Proc. § 432.

⁶ *Tuchband v. Chicago &c. R. Co.*, (1889) 115 N. Y. 437.

⁷ *Hat-Sweat Manuf. Co. v. Davis &c. Co.*, 31 Fed. Rep. 294.

county where the suit is brought.¹ Again where service upon an agent simply is prescribed, the person to whom the foreign corporation commits the management and control of its business in executing a building contract is well served.² An agreement by a foreign corporation and an individual who is to sell its manufactures in a certain county in another State, makes him its agent within the statutes regulating the service of process.³ And the agency will not be regarded as terminated upon the last day of the term of the agreement as to a third party who has bought a machine of the agent, when there has been no final settlement with and discharge of the agent.⁴ It has been held that under a statute providing that in the absence of the principal officers of a foreign corporation, service may be made on a managing agent "within the State," service on the general manager of a foreign corporation, while within the State temporarily, and not performing the duties of his office, is sufficient.⁵ But in an action by a resident of New York against a foreign corporation, which does not do business, or have office, agent, or property within that State, service of process upon an officer of the corporation, while temporarily there, does not confer jurisdiction upon the court from which it issued.⁶ And under an act of congress which declares that "no civil suit shall be brought against any person by any original process in any other dis-

¹ *Societe Fonciere et Agricole v. Milliken*, (1890) 135 U. S. 304; Tex. Rev. Stat. art. 1223.

² *Norton v. Berlin &c. Co.*, 51 N. J. 442.

³ *Gross v. Nichols*, (1887) 72 Iowa, 23; *Brunson v. Nichols*, (1887) 72 Iowa, 763.

⁴ *Gross v. Nichols*, (1887) 72 Iowa, 23; *Brunson v. Nichols*, (1887) 72 Iowa, 763. In *Sturgis v. Crescent Jute Manuf. Co.*, (1890) 10 N. Y. Supl. 470, it appeared that prior to the service of summons upon one B., as officer or managing agent of defendant, a foreign corporation, under N. Y. Code Civil Proc. § 432, B. had resigned his position of president of the corporation, and he made affida-

vit that subsequently he sustained no relation to defendant except as a member of a firm which was under contract to sell defendant's goods and to advance moneys to defendant. On the day of the service of summons B. gave directions as to the disposition of certain property consigned to defendant, but with the directions B. communicated the fact of his resignation. And the court decided that the service could not be sustained.

⁵ *Porter v. Sewall Safety Car-Heating Co.*, 7 N. Y. Supl. 166; N. Y. Code Civ. Proc. § 432, subd. 3.

⁶ *Golden v. The Morning News*, (1890) 42 Fed. Rep. 112.

strict than that whereof he is an inhabitant or in which he shall be found," a corporation can not be served with process outside of the State where it was created.¹ Where a foreign corporation had appointed the commissioner of corporations to be its attorney, on whom process might be served pursuant to the statute, and its attorney in the suit accepted service to the same extent that the plaintiff would have obtained service by leaving a copy of the writ with the commissioner of corporations, it was held that the service was sufficient to give jurisdiction to render a personal judgment against defendant.² A plea in abatement in an action commenced in the State court against a foreign corporation showed that the writ was not properly served as a writ of summons, but the writ and return showed that the writ issued and was served as a writ of attachment. And it was held that as the plea did not deny that the person with whom the copy was left was defendant's known agent or attorney, or that it was left with him at the place of attachment, it was bad, such service being authorized by the State laws.³ Under the statutory provision that service of process "can be made upon a foreign corporation only, either when it has property within the State, or the cause of action exists in favor of a resident of the State," it is not necessary, in order that the court may obtain jurisdiction in an action against it, for an allegation to be made setting forth the existence of some one of these facts, and a failure to do so will not be sufficient ground to sustain a demurrer.⁴ In *Mis-*

¹ *Hume v. Pittsburgh &c. Ry. Co.*, 8 Biss. C. Ct. 81.

² *Wilson v. Martin-Wilson &c. Co.*, (1889) 149 Mass. 24. An appointment by a foreign insurance company of the superintendent of the insurance department as its attorney, on whom process for the commencement of actions may be served as required by the statute, is valid, although the appointment is of the superintendent and "his successor in office," described only by his official title, and not by his individual name. The appointment, being authorized

by a formal resolution of the directors, and signed by the president and secretary, with the corporate seal affixed, and its execution acknowledged and proved before a notary, is sufficiently certified and authenticated to fulfill the requirements of the act, which does not provide that the appointment be authenticated in any particular manner. *Laffin v. Travelers' Ins. Co.*, (1890) 121 N. Y. 713.

³ *Shampeau v. Connecticut &c. Co.*, (1889) 37 Fed. Rep. 771, construing Vt. Rev. Stat. § 881.

⁴ *Friezen v. Allemania &c. Ins. Co.*,

souri the law for the service of corporations places them on the same footing as individuals, and authorizes a general judgment against the party served.¹

§ 890. The same subject continued — “Doing business” construed.— Under the statute limiting suits to foreign corporations doing business within a State, the purchasing of raw material in a city thereof by correspondence or by sending an agent, is not such a doing business as will make a service in that city of the managing agent of the corporation there upon a pleasure trip effectual.² And under the federal statute it is always for the federal court to determine whether a non-resident corporation has transacted business to such an extent within the district, and has such a representative or agent therein, that jurisdiction to render a personal judgment against the corporation may be acquired by service on that agent.³ A State statute providing for service upon foreign corporations doing business in the State, does not repeal a former one regulating the service upon them when having local agents.⁴ But the mere fact that a corporation has sent its property in the charge of its agents into a foreign State for the purpose of exhibition and advertisement, does not constitute such a carrying on of business there as to subject it to being served with process.⁵

§ 891. Garnishee process.— A statutory provision for the service of process in suits against foreign corporations does not apply to the service of writs of garnishment.⁶ And where garnishee process against a foreign corporation, to show cause why judgment should not be rendered against it, is served on officers of the corporation, who make affidavit that they are not principal officers, and the corporation appears only specially to move to quash the proceedings on the ground of no

30 Fed. Rep. 349, construing Wis. Rev. Stat. § 2637, subd. 11.

¹ McNichol v. United States Mercantile Reporting Agency, (1883) 74 Mo. 457.

² St. Louis &c. Co. v. Consolidated &c. Co., 32 Fed. Rep. 802.

³ St. Louis &c. Co. v. Consolidated &c. Co., 32 Fed. Rep. 802.

⁴ Cumberland &c. Co. v. Turner, (1889) 88 Tenn. 265, construing Tenn. Code, §§ 2831-2834, 3536-3539.

⁵ Carpenter v. Westinghouse &c. Co., 32 Fed. Rep. 434, 437.

⁶ Milwaukee &c. Co. v. Brevoort, 73 Mich. 73.

service, no judgment can be rendered against the corporation.¹

§ 892. *Actions by foreign corporations.*—An action will generally lie in favor of a foreign corporation for the purpose of enforcing its contracts.² And it will be presumed that a foreign corporation plaintiff has done that which entitles it to do business and to sue in the State, its complaint being silent on the subject.³ Under a law making invalid the contracts of foreign corporations for failure to comply with certain regulations before doing business in the State, it was held that a demurrer to a suit by a foreign corporation on a note and mortgage for money lent, was bad, it not appearing where the loan was made.⁴ Even a provision prohibiting foreign

¹ *First Nat. Bank v. Burch*, 76 Mich. 608.

² *Diamond Match Co. v. Roeber*, 106 N. Y. 473. The California statute providing that no corporation shall maintain or defend any action in relation to its property until it has filed a copy of the articles of its incorporation with the clerk of the county, does not apply to foreign corporations. *South Yuba &c. Co. v. Rosa*, (1889) 80 Cal. 333, construing Cal. Civ. Code, § 299.

³ *Sprague v. Cutler &c. Co.*, 106 Ind. 242. Accordingly a foreign corporation need not allege in its complaint that it has filed with the secretary of the Territory a copy of its articles of incorporation, and appointment of an agent to receive service of process; a demurrer, therefore, to the complaint, because of such omission, can not be sustained. *American Button-Hole &c. Co. v. Moore*, (1884) 2 Dak. 280. Although the failure to obtain a permit as required by statute may preclude a foreign corporation from transacting further business in the State, it can not be made to divest its right to go into court and assert rights and recover property already acquired.

Texas &c. Co. v. Worsham, (1890) 76 Tex. 556. And it is no defense to an action by a corporation on the bond of its agent to recover for the agent's default, that at the time of default it was a foreign corporation doing business in the State where action was brought, without having complied with the laws regulating foreign corporations doing business therein. *Singer Manuf. Co. v. Hardee*, (N. M. 1888) 16 Pacif. Rep. 605. So also an objection that a foreign corporation has no authority to sue on account of non-compliance with the laws relating to such corporations, will not be considered on appeal, where the answer merely states legal conclusions, as that plaintiff had not recorded a "duly-authenticated copy" of the appointment or commission of any agent "duly authorized" to accept service of process, and where there is no evidence in the abstract that the statute relating to foreign corporations has not been complied with. *Gull River Lumber Co. v. Keefe*, (Dak. 1889) 41 N. W. Rep. 743.

⁴ *Finch v. Travellers' Ins. Co.*, 87 Ind. 302, construing Ind. Rev. Stat. §§ 3022-3025.

corporations from transacting business within the State unless they have therein a known place of business and an agent capable of being served with process, does not invalidate an individual contract between a foreign corporation and a citizen of the State, nor does it preclude an action by the corporation within the State on a breach of the contract.¹ On the other hand, it has been held that in a suit by a foreign corporation it must show, not only the papers and proceedings of incorporation, but the statute of the State where it was incorporated, authorizing incorporation.²

§ 893. Actions by receivers of foreign corporations.—A foreign corporation having the right to institute suits in a State, it follows that its assignee, it having become insolvent, has a similar right.³ And in a suit by the receiver of a foreign corporation against its officer to reach its assets, defendant can not set up the legal incapacity of the corporation to do business in the State where sued, the State not having complained.⁴ In an action on a note in the name of a foreign corporation, where the plaintiff proved the appointment of the receiver, and then introduced in evidence the statute of the foreign State authorizing the appointment on dissolution of a corporation, it was held that the evidence showed that the corporation was dissolved, and was not the real party in interest, and the action was properly dismissed.⁵

§ 894. Actions by stockholders of foreign corporations.—Under a law providing that a resident of the State or a domestic corporation may sue a foreign corporation for any cause of action, resident stockholders of a foreign corporation may sue it in the courts of their State to enjoin it and its directors from constructing branch lines of railroad, and from expending funds therefor, which are within the State, to the irreparable injury of the stockholders.⁶ And resident stock-

¹Cooper Manuf. Co. v. Ferguson, 113 U. S. 727.

²Savage v. Russell, (1887) 84 Ala. 103.

³Life Association of America v. Levy, (1882) 33 La. Ann. 1203.

⁴Williams v. Hintermeister, 26 Fed. Rep. 889.

⁵Merchants' Loan & Trust Co. v. Clair, (1887) 107 N. Y. 663.

⁶Ives v. Smith, (1890) 8 N. Y. Supl. 46, affirming 3 N. Y. Supl. 645, construing N. Y. Civ. Code Proc. § 1780.

holders of a foreign corporation may sue another foreign corporation to compel it to perform its agreement to issue certain of its capital stock to the company of which plaintiffs are stockholders, or, in case of its failure to issue the same, then to recover damages.¹ To enable a stockholder, suing as such, to maintain an action against a foreign corporation, it is not necessary that his stock should be registered.² But a controversy between *bona fide* stockholders of a corporation on the one side, and those claiming to be stockholders and the president and directors on the other, can only be determined by the courts of the State by which the corporation was created.³ And the courts of Maryland will not interfere in controversies relating only to the internal management of the affairs of a foreign corporation. They hold that where the act of a foreign corporation affects one solely in his capacity as a member, it may be said to relate to the management of the internal affairs of the corporation; otherwise where the act affects his individual rights.⁴

§ 895. **Actions against foreign corporations.**—By the constitution of Alabama suit may be brought against a foreign corporation in any county where it does business.⁵ And under a statute providing that when all the defendants are non-residents of the State, suit may be brought in any county, a foreign corporation having an office in the State may be sued in any county thereof.⁶ Under the West Virginia code, a foreign corporation which does business in the State may be sued in any county where process can be legally served, although the cause of action arose out of the State.⁷ Under the provision of the Texas act that a company may be sued in any

¹ *Babcock v. Schuylkill &c. R. Co.*, (1890) 9 N. Y. Supl. 845.

² *Ervin v. Oregon Railway & Navigation Co.*, (1882) 62 How. Pr. 490.

³ *Wilkins v. Thorne*, (1884) 60 Md. 253.

⁴ *North State Copper &c. Mining Co. v. Field*, (1886) 64 Md. 151.

⁵ Ala. Const. art. xiv, § 4.

⁶ *Estill v. New York &c. R. Co.*, (1890) 41 Fed. Rep. 849, construing Mo. Rev. Stat. § 3481, subd. 4. The

terms "any private corporation" and "any incorporated company," in the Texas statutes relating to suits against corporations, are broad enough to include foreign corporations. *Augerhoefer v. Bradstreet Co.*, (1895) 22 Fed. Rep. 353, construing Tex. Rev. Stat. art. 1223.

⁷ *Humphreys v. Newport News &c. Co.*, (1889) 33 W. Va. 135, construing W. Va. Code, ch. 123, § 1.

county where it has an agent or representative, it is held that it can be sued only in counties where it has an agent or representative.¹ A statutory provision that a company can not maintain or defend suits relating to its property without first having filed a certified copy of its articles of incorporation in the county where the property is situated, does not apply to an action against it for work and labor.² And under a statute requiring a foreign corporation doing business in a territory to record its charter, it is held that failure to comply therewith simply relieves the party suing it from proving the incorporation except by reputation.³ But it has been held proper to sue as partners persons claiming to be a foreign corporation, when it was shown that not until after the right of action accrued was the statutory requirement of the foreign State complied with as to filing the articles of incorporation.⁴ For a tort committed by a foreign corporation within the State of Pennsylvania, the corporation is liable to be sued therein if found in the State in the person of an officer or agent upon whom process may be served.⁵ So also under an act authorizing suits against foreign corporations by residents of New York for any cause of action, a suit may be brought by a resident executor, upon a policy issued by a Connecticut corporation upon the life of the testator, who lived and died in that State, letters having issued in New York.⁶ And again a resident of New York may maintain an action against a foreign corporation, although the acts out of which the cause of action arises, and the property from the management and disposition of which plaintiff's loss and damage were sustained, are beyond the jurisdiction, and the relief which it is in the power of the court to grant may be incomplete.⁷ But it is held that a railroad corporation controlling a line in several States, but not in Iowa, can not be sued there by a citizen of Iowa on

¹ *St. Louis & C. R. Co. v. Whitley*, (1890) 77 Tex. 126.

² *Weeks v. Garibaldi & Co.*, (1887) 73 Cal. 599.

³ *King v. National M. & E. Co.*, (1884) 4 Mont. 1, construing Mont. Cod. Stat. 1872, p. 419, § 46.

⁴ *Smith v. Warden*, 86 Mo. 382.

⁵ *Gray v. Taper Sleeve Pulley Works*, (1883) 15 Fed. Rep. 436.

⁶ *Palmer v. Phoenix Mut. Life Ins. Co.*, 84 N. Y. 63, construing N. Y. Code Civ. Proc. § 427.

⁷ *Ervin v. Oregon Railway & Navigation Co.*, 62 How. Pr. 490.

a cause of action not arising there.¹ In a suit against a foreign corporation it is not necessary that the existence of any of the statutory facts giving jurisdiction should be alleged to give the court jurisdiction, and the petition is not demurrable for the failure.² So also, where, in an action on a policy issued by a foreign insurance company, the declaration, the application, and the policy showed that defendant was doing business in the State; and it pleaded nothing to the contrary, and did nothing to oust the jurisdiction of the court, it was considered that the objection that there was no allegation or proof that the company was doing business in the State, was not well taken.³ A contract of fire insurance made in Iowa, the statutes of which State provide in what counties an action may be brought on the policy, does not limit the right to bring an action for loss of the property to that State, for the action is transitory in its nature, and may be brought wherever service may be had on the company.⁴ It seems that a company established in two States may be sued in either as a non-resident.⁵

§ 896. Actions by non-residents against foreign corporations.—A foreign corporation can be sued by a non-resident only in one of the cases specified in the statutes giving the jurisdiction.⁶ And the right of the non-resident to sue a foreign corporation depends on the plaintiff's residence, not on his citizenship.⁷ Therefore a statute restricting this power to cases where the cause of action arises in the State, is not unconstitutional as violating the privileges and immunities of citizens in the several States.⁸ Neither is it unconstitutional as impairing the obligation of contracts, as a corporation,

¹ *Elgin Canning Co. v. Atchison &c. R. Co.*, 24 Fed. Rep. 866.

² *Friezen v. Allemania Fire Ins. Co.*, 30 Fed. Rep. 349.

³ *Hull v. Alabama Gold Life Ins. Co.*, (1887) 79 Ga. 93.

⁴ *Insurance Co. of North America v. McLimans*, (Neb. 1890) 44 N. W. Rep. 991.

⁵ *Newport & C. Bridge Co. v. Wooley*, 78 Ky. 523.

⁶ *Ervin v. Oregon Ry. & Navigation Co.*, (1883) 28 Hun, 269; *Central R. &c. Co. v. Georgia &c. Co.*, (1889) 32 S. C. 319; N. Y. Code Civ. Proc. § 1780; S. C. Code, § 423.

⁷ *Adams v. Penn Bank*, (1885) 35 Hun, 393.

⁸ *Central R. &c. Co. v. Georgia &c. Co.*, (1889) 32 S. C. 319.

being the mere creation of the local law, depends for recognition of its legal existence by other States on the assent of the States, and a State may make such regulations in regard to corporations created in another State as it deems best, or may exclude them altogether. Neither is it in conflict with a constitution of a State which provides that "all courts shall be public, and every person, for any injury that he may receive in his lands, goods, person or reputation, shall have remedy by due course of law," as the object of that section of the constitution was not to open the courts of the State to all persons, to demand redress for injuries received anywhere, but simply to secure to the inhabitants of the State access to the courts for the redress of injuries which they may have received.¹ Under statutes which either simply give non-residents the right to sue foreign corporations if the cause of action arises within the State; or for enumerated causes all of which arise within the State, a suit between such parties upon causes of action not arising within the State can not be maintained.² And where plaintiff, a national bank organized and doing business in Louisiana, purchased of another bank, also a Lou-

¹ *Central R. &c. Co. v. Georgia &c. Co.*, (1889) 32 S. C. 319.

² *Robinson v. Oceanic &c. Co.*, (1889) 112 N. Y. 315; *Central R. &c. Co. v. Georgia &c. Co.*, (1889) 32 S. C. 319. *Cf.* S. C. Code, § 423; N. Y. Code Civ. Proc. § 1780. But where a motion is made under these statutes to dismiss an action based on the complaint and affidavits in the case, on the ground that the court has no jurisdiction because the action is by a non-resident against a foreign corporation on a cause of action which did not arise in this State, and the complaint alleges that plaintiff entered into a contract with defendant to do work on a railroad running from a certain place in this State to a place in another State, and the complaint contains a bill of particulars showing that a considerable amount of work was done in this State, and it also appears from the

affidavits that a part of plaintiff's claim is evidenced by notes executed in this State, the motion will be denied. *Central R. &c. Co. v. Georgia &c. Co.*, (1889) 32 S. C. 319. Although property seized under attachment proceedings does not constitute "the subject of the action," so as to give the court jurisdiction of an action by a non-resident against a foreign corporation, when there is no allegation in the complaint filed in the action of any title to, or any interest in, the property levied on; as an attachment is only a provisional remedy, which requires an action legally instituted as a necessary condition precedent to the right to maintain it, and the real subject of the action must necessarily be the subject of the complaint. *Central R. &c. Co. v. Georgia &c. Co.*, (1889) 32 S. C. 319.

isiana corporation, a draft on bankers in New York, drawn to plaintiff's order, and payment was refused, and a suit begun in New York, and funds of the second bank attached therein, it was held that under the section of the code providing that an action may be begun in New York against a foreign corporation by a plaintiff not a resident of the State "when the cause of action shall have arisen in this State," the court had jurisdiction.¹

§ 897. Actions by foreign corporations against foreign corporations.—Foreign corporations may sue one another if both are doing business within the State, and the cause of action accrued there.² Accordingly, where an unlawful transfer of stock is made in New York by the transfer agency of a foreign corporation, the wrongful act is committed there, and therefore the State courts have jurisdiction although the party injured is also a foreign corporation.³ And a foreign corporation may institute proceedings in New York for an injunction against the prosecution of an arbitration begun under an agreement with another foreign corporation.⁴ So also, when there is a statutory provision for acquiring jurisdiction, a corporation of another State can sue an alien corporation in the federal courts.⁵ But the legislature may restrict the right of one foreign corporation to sue another.⁶ And a foreign construction company can not maintain a bill in equity in Massachusetts against a foreign railroad corporation and a citizen of Massachusetts, to enforce specific performance of a covenant in a contract for the delivery of bonds and certificates of stock in payment of work to be performed by the construction company in a foreign State, and to restrain, by injunction, the citizen of Massachusetts from disposing there of shares of stock and bonds of the railroad company, alleged to have

¹ *Hibernia Bank v. Lacombe*, 84 N. Y. 367; s. c. 38 Am. Rep. 518. *Dominion Telegraph Co.*, 84 N. Y. 153, reversing s. c. 22 Hun, 568.

² *Emerson v. McCormick Harvesting Machine Co.*, (1884) 51 Mich. 5.

³ *Toronto General Trust Co. v. Chicago &c. R. Co.*, 32 Hun, 190. *Cf.* N. Y. Code Civ. Proc. § 1780, subd. 3.

⁴ *Direct United States Cable Co. v.*

⁵ *Merchants' Manuf. Co. v. Grand Trunk Ry. Co.*, (1882) 63 How. Pr. 459.

⁶ *Duquesne Club v. Penn Bank*, (1885) 35 Hun, 390. *Cf.* N. Y. Code Civ. Proc. § 1780.

been delivered to him in violation of the plaintiff's rights, although the railroad corporation has an office in Massachusetts for the transfer of stock, and has appeared by attorney in the suit.¹

§ 898. **Actions in federal courts.**—In the absence of a voluntary appearance, three things are requisite to give the federal courts jurisdiction *in personam* over a corporation created without the territorial limits of the State in which the court is held. First, it must appear as a matter of fact that the corporation is carrying on its business in the foreign State or district. Second, that the business is transacted or managed by some agent or officer appointed by and representing the corporation in the State. Third, some local law making that corporation, or foreign corporations generally, amenable to suit there.² A corporation can not acquire a residence in a State other than the one in which it is incorporated within the meaning of the act which provides that suit in the federal courts shall be brought in the district of the residence of either the plaintiff or defendant.³ Accordingly a corporation can not be sued in a State other than the one of its incorporation because of its maintaining an office and having an agent there.⁴ But where corporations in consideration of the grant of the privilege of doing business in a State have agreed that they may be sued there, they may be so sued in the federal as well as State courts.⁵ It has been decided that a New York corporation, having its principal office in that State, and doing business in Illinois, can not be sued in the federal courts in Illinois.⁶ And a citizen of Mexico can not sue a Connecticut corporation in the United States circuit court for the southern district of California, although the corporation has an office and managing agent in that district.⁷ The pres-

¹ *Kansas R. &c. Co. v. Topeka &c. &c. Co.*, 42 Fed. Rep. 81; s. c. 8 Ry. R. Co., (1884) 135 Mass. 34; s. c. 46 & Corp. L. J. 62.
Am. Rep. 439.

² *Case of Telephone Co.*, 29 Fed. Rep. 17; *Carpenter v. Westinghouse Air-Brake Co.*, 32 Fed. Rep. 434.

³ *Booth v. St. Louis &c. Co.*, 40 Fed. Rep. 1.

⁴ *Bensinger &c. Co. v. National* Fed. Rep. 1.

⁵ *Ex parte Schollenberger*, 96 U. S. 377; *Lafayette Ins. Co. v. French*, 18 How. 404.

⁶ *Preston v. Fire-Extinguisher Manuf. Co.*, 36 Fed. Rep. 721.

⁷ *Denton v. International Co.*, 36

ence of the chief officers of a corporation in a State other than that of its creation, does not change the residence of the corporation, nor does the fact that the officers carry into the State property of the corporation, for the purpose of exhibition and advertisement, bring the corporation into the State as an "inhabitant," or so that it can be said to be "found" there, within the meaning of the act of congress.¹ Where, however, a plaintiff is a citizen of Massachusetts, and defendant a corporation created by the law of Rhode Island as well as by the law of Massachusetts, the suit may be brought in the federal court for the Rhode Island district. For the purposes of the suit, defendant is to be deemed a citizen of Rhode Island.² And the fact that a foreign corporation is in liquidation, and has been placed by the courts of that country in the hands of a liquidator, will not prevent a person from establishing his claim against the corporation by suit in a federal court, and subjecting its property to the satisfaction thereof.³

§ 899. Removal of causes into federal courts.—The filing by a foreign corporation of its articles of incorporation with the Secretary of State of a foreign State, as required by an act thereof, does not alter its *status* as a foreign corporation. Accordingly, in an action brought against it by a corporation of that State, the defendant may have the cause removed from a State court to a United States circuit court.⁴ And a statutory restriction, to prevent foreign corporations from transacting

¹ Thus the operation of a train of its cars by a foreign corporation in Iowa, for the purpose of exhibition and advertisement, when neither passengers nor freight are transported, does not come within the law authorizing suits to be brought against railway companies and the owners of lines, or persons operating the same, in any county through which the line or road passes or is operated; nor does it come within that which provides that when a corporation, company, or individual has an office or agency in any county for the transaction of business, any

suits growing out of or connected with the business of that office or agency may be brought in the county where the agency is located; and this is so, although the wrong complained of was the alleged infringement of a patent by such operation of a train of cars. *Carpenter v. Westinghouse &c. Co.*, 32 Fed. Rep. 434.

² *Page v. Fall River &c. R. Co.*, (1887) 31 Fed. Rep. 237.

³ *Societe Fonciere et Agricole v. Milliken*, (1890) 135 U. S. 304.

⁴ *Chicago &c. R. Co. v. Minnesota &c. R. Co.*, 29 Fed. Rep. 337.

business in the State without a permit, is rendered void by a provision that, as a condition precedent to the issue of such permit, they shall surrender their right to remove certain suits into the federal courts, it appearing to be the entire purpose of the statute to deprive those companies of that right.¹ Where a consolidation of a foreign with a domestic railroad has not taken place till after suit brought against the foreign corporation by a domestic corporation, and the filing of a petition for removal, the consolidation does not alter the foreign corporation's right to a removal of the cause.² An action for trespass against two corporations jointly, brought in a State court, can not be removed to a federal court by one of the defendants upon the ground of a separable controversy between itself and plaintiff, though defendants plead severally, on the mere allegation that the other defendant was not in existence at the time of the alleged trespass, as this affects the merits, and not the jurisdiction.³ Where, in an action by a State in

¹ *Barron v. Burnside*, 121 U. S. 186; *Texas &c. Co. v. Worsham*, (1890) 76 Tex. 556. And where a foreign corporation commenced a suit of foreclosure in the circuit court of the United States, but discontinued that suit, and commenced an action in the State court for the same purpose, the commencement of the suit in the federal court, although prohibited by the terms of the statute forbidding foreign corporations doing business in the State from commencing suits in or removing them to federal courts, did not affect the right of the corporation to maintain the action in the State court. *Northwestern Mut. Life Ins. Co. v. Stone*, (Minn. 1886) 31 N. W. Rep. 54.

² *Chicago &c. R. Co. v. Minnesota &c. R. Co.*, 39 Fed. Rep. 337.

³ *Louisville &c. R. Co. v. Wangelin*, (1890) 132 U. S. 599, following *Railroad Co. v. Grayson*, 119 U. S. 240, 244, which was a suit in equity against two corporations, where the question being whether there was a separable controversy between one of them

and the plaintiff which would warrant a removal into the circuit court of the United States, it was said by Chief Justice Waite, and adjudged by this court, that the allegations of the bill must, for the purposes of that inquiry, be taken as confessed. In the case at bar the declaration charged two corporations with having jointly trespassed on the plaintiff's land. Whether they had done so or not was a question to be decided at the trial; and it is not contended, and could not be, in the face of the decisions already cited, that the record of the State court, as it stood at the time of the filing of the petition for removal, showed a separable controversy between the plaintiff and either defendant. The argument in support of the jurisdiction of the federal court is that the Louisville & Nashville Railroad Company was the only real defendant, because, at the time of the trespass complained of, the other defendant was not in existence. But this was a matter affecting the merits of the

its own courts to recover certain penalties imposed on foreign insurance companies for doing business without complying with the State laws, the right of recovery depends on the question of mixed law and fact, whether service of summons has been made on a person who was at the time an agent of the company within the State on whom process might legally be served, so as to bind the company and bring it within the jurisdiction of the court, there is no question dependent on a construction of the constitution or any law of the United States, and therefore no cause for removal, since until the question of jurisdiction is decided there is no "suit brought," within the terms of the act of congress authorizing such removals.¹

case, and one which the plaintiff was entitled to deny and disprove at the trial upon the issues joined by the pleadings. Both the defendants were sued and served as corporations, and pleaded as such, in the State court; and it is not denied that each of them was a corporation when the action was brought. The question whether one of them was in existence as a corporation at the time of the alleged trespass did not affect the question

whether it could be now sued, but the question of its liability in the action; in other words, not the jurisdiction, but the merits, to be determined when the case came to trial. It could not be tried and determined in advance, as incidental to a petition by a co-defendant to remove the case into the circuit court of the United States.

¹ *Germania Ins. Co. v. State of Wisconsin*, (1886) 119 U. S. 473.

CHAPTER XLV.

ACTIONS BY AND AGAINST VOLUNTARY ASSOCIATIONS.

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| § 900. Introductory. | § 906. The same subject continued. |
| 901. Suits by members. | 907. Actions for "benefits." |
| 902. Suits by officers — (a) At common law. | 908. Actions by and against withdrawing members. |
| 903. (b) Statutory suits through agents. | 909. Actions on subscriptions. |
| 904. The same subject continued. | 910. Actions to prevent illegal and <i>ultra vires</i> acts. |
| 905. Actions by members against their associates. | |

§ 900. **Introductory.**—Suits by and against unincorporated associations can not at common law be brought and maintained in the name of the association, nor in the name of its agents or trustees.¹ As in case of partnerships consisting of numerous members, the action must in the first instance be instituted in the names of all the members.² Therefore an unincorporated lodge of free masons can not sue for the recovery of property of the lodge, but will be permitted to sue only as individuals.³ So the members of an unincorporated association, formed with a view to pecuniary profit, should not sue as a corporation or society but as partners.⁴ So also unincorporated business associations are partnerships and each member is liable to the full extent of the partnership indebtedness, and all the members must be joined in a suit against the association.⁵ And an action on a promissory note signed

¹ *Curd v. Wallace*, 7 Dana, 190; s. c. 32 Am. Dec. 85; *Detroit Schuetzen Bund v. Detroit Agitations Verein*, 44 Mich. 313; s. c. 38 Am. Rep. 270, holding that a court will not entertain a suit in the name of an unincorporated association, especially where it has been formed for the purpose of resisting the liquor laws of the State. *Detroit Schuetzen Bund v. Detroit Agitations Verein*, 44 Mich. 313.

² *Curd v. Wallace*, 7 Dana, 190; s. c. 32 Am. Dec. 85; *Williams v. Bank of Michigan*, 7 Wend. 542; *Sullivan v. Campbell*, 2 Hall, 271; *Pipe v. Bateman*, 1 Iowa, 369; *Teed v. Elworthy*, 14 East, 210.

³ *Lloyd v. Loaring*, 6 Ves. Jr. 773; *Fells v. Read*, 3 Ves. Jr. 70; *Smith v. Smith*, 3 Desaus. 557.

⁴ *Pipe v. Bateman*, 1 Iowa, 369.

⁵ *Williams v. Bank of Michigan*, 7 Wend. 542; *Wells v. Gates*, 18 Barb.

by the directors of a voluntary association, should be in the names of all the members as defendants; but if the action is brought against the directors the non-joinder of the members must be pleaded in abatement.¹ One, however, whose name is improperly signed to the articles of association, may be omitted as a defendant in an action against an association.² An association having made an unsuccessful attempt to incorporate does business as a partnership.³

§ 901. **Suits by members.**— Although a voluntary association can not sue in a corporate capacity, yet on the ground of their common interest, the members may sue in their own names on behalf of the society,⁴ and on behalf of themselves and others having a like interest for purposes common and beneficial to all,⁵ to protect the funds or property of the association,⁶ especially where the parties are numerous;⁷ the general rule being that where the members of an unincorporated association are too numerous to be joined in an action, or where the society is composed of very many members, one or more of them may sue on behalf of all the interested parties, but the representative capacity of the few members must be distinctly stated in the declaration.⁸ For the mere fact that the society is unincorporated and its members numerous will not warrant a suit by one member in behalf of the society, unless the nature and terms of his authority to bring suit appear in the complaint.⁹

§ 902. **Suits by officers** — (a) **At common law.**— Although one member of a voluntary association may not in his own name sue for the benefit of all;¹⁰ and although in general an

554; *Hess v. Werts*, 4 Serg. & W. 356.

¹ *McGreary v. Chandler*, 58 Me. 537; *Robinson v. Robinson*, 10 Me. 240.

² *Boyd v. Merrill*, 52 Ill. 151.

³ *Coleman v. Coleman*, 78 Ind. 344.

⁴ *Mears v. Moulton*, 30 Md. 142.

⁵ *Beatty v. Kurtz*, 2 Pet. 566.

⁶ *Lloyd v. Loaring*, 6 Ves. 773; *Mears v. Moulton*, 30 Md. 142.

⁷ *Beatty v. Kurtz*, 2 Pet. 566.

⁸ *Dennis v. Kennedy*, 19 Barb. 517; *Wood v. Draper*, 24 Barb. 187; *Smith v. Lockwood*, 1 Code Rep. N. S. 319; *Birmingham v. Gallagher*, 112 Mass. 190; *Snow v. Wheeler*, 113 Mass. 179; *Pipe v. Batemar*, 1 Iowa, 369; *Marshall v. Lovelass*, Cam. & N. 217; *Lloyd v. Loaring*, 6 Ves. 773.

⁹ *Habicht v. Pemberton*, 4 Sandf. 657.

¹⁰ *Habicht v. Pemberton*, 4 Sandf. 657.

unincorporated company can not at common law sue in the name of its trustees;¹ it may bring suit by its agents properly appointed.² For a plain equity principle allows a committee of an unincorporated society to sue and be sued as representatives of the whole.³ And as religious societies have from the earliest times been invested as *quasi*-corporations with the right to acquire and hold property as a means of promoting their praiseworthy objects,⁴ the trustees *de facto* of a religious society, whether it be incorporated or not, may maintain an action against a trespasser for an injury to a meeting house.⁵ So also the regularly appointed committee of a voluntary religious society, who are in the actual possession of certain premises used as a church and burial ground, may file a bill to restrain the heirs of the donor from disturbing the possession.⁶ And again the holder of a check being the cashier of an unincorporated banking association, and holding it for the use of the concern, was allowed to recover upon it in his own name.⁷ But it has been held that the treasurer of a voluntary association could not maintain a suit on a note given to the association and made payable to "the treasurer" thereof.⁸ On the other hand, a Shaker community, whose property is held and whose contracts are made by trustees; may be held liable on their contracts in suits brought against the trustees; judgment rendered against the trustees in such suits may be satisfied by levy on the property of the community; and the writs, judgments and executions, may run against the trustees and their successors in their official capacity.⁹

§ 903. (b) **Statutory suits through officers.**—In some of the American States and in England there are statutes authorizing unincorporated societies to sue and be sued in the names of their officers, trustees, committees and the like.¹⁰ Thus the

¹ *Niven v. Spickerman*, 12 Johns. 401.

² *Habicht v. Pemberton*, 4 Sandf. 637.

³ *Phipps v. Jones*, (1853) 20 Pa. St. 260; *Cullen v. Queensberry*, 1 Bro. C. C. 101; *Cousins v. Smith*, 13 Ves. 544.

⁴ *Burton's Appeal*, 57 Pa. St. 218.

⁵ *Green v. Cady*, 9 Wend. 414.

⁶ *Beatty v. Kurtz*, 2 Pet. 566.

⁷ *O'Brien v. Smith*, 1 Blackf. 99.

⁸ *Ewing v. Medlock*, 5 Port. (Ala.) 82.

⁹ *Davis v. Bradford*, 58 N. H. 476.

¹⁰ *E. g.* 3 Geo. IV, ch. 126, § 74; N. Y. Code Civ. Proc. § 1919; 1 Chitty Pleading, 16, 17.

code of New York provides that any unincorporated company or association composed of not less than seven persons, may sue and be sued in the name of its president or treasurer.¹ And an English statute allows church-wardens to be sued in certain respects.² As these statutes give a right not existing at common law, in order that they may be effective they must be strictly pursued.³ Accordingly under a statute authorizing suit against the president or treasurer, an action is improperly brought if instituted against the president, secretary and treasurer.⁴ The liability of members of an unincorporated association as partners is preserved though not extended by these acts;⁵ although an action can not be maintained against the individual members of the association upon a debt due from the association, unless action was first brought against its president or treasurer.⁶ These acts were intended to apply to suits having in view a remedy against the joint property and effects of such companies and associations, and when a suit is brought for an injunction, it is not well brought against the president of the association merely.⁷ As they respect the remedy only, however, they are of local application, and as a joint-stock company of New York which may be sued in the names of its officers, is not a corporation but a partnership, a member may be liable in another State as an individual partner.⁸ The objection of a non-joinder of par-

¹ N. Y. Code Civ. Proc. § 1919; *Tibbets v. Blood*, 21 Barb. 650; *Olery v. Brown*, 51 How. Pr. 92; *Sewell v. Ives*, 61 How. Pr. 54; *Poultney v. Bachman*, 62 How. Pr. 466. An averment that the association consists of seven or more members is enough; their names need not be contained in the complaint. *Tibbets v. Blood*, 31 Barb. 650. The judgment and the execution are properly against the president as such, and they bind the joint property of the association, not the individual property of the president. *Schuylerville Bank v. Van Derwerker*, 74 N. Y. 234.

² *Doe v. Harpur*, 2 Dow. & Ry. 708.

³ *Timms v. Williams*, 2 Gale & D. 621; *Hughes v. Thorpe*, 5 Mees. & W. 656, 667.

⁴ *Schmidt v. Gunther*, 5 Daly, 452.

⁵ *Kingsland v. Braisted*, 2 Lans. 17. Therefore where, without organization, articles of association or by-laws, a society is formed for social and recreative purposes, and a name is assumed by which liabilities are incurred, the members become jointly liable for any indebtedness incurred. *Park v. Spaulding*, 10 Hun, 128.

⁶ *Flagg v. Swift*, 25 Hun, 623.

⁷ *Rorke v. Russell*, 2 Lans. 244.

⁸ *Boston &c. R. Co. v. Pearson*, 128 Mass. 445. *Cf. Dinsmore v. Philadelphia &c. R. Co.*, 11 Phila. 483;

ties defendant is not available to the defendant association when sued by a firm, several members of which are also members of the association.¹

§ 904. **The same subject continued.**—By statute in Indiana a church organization can sue only in the name of wardens and vestrymen or trustees of the church.² And in Kentucky the trustees of an unincorporated religious society, in whom title is vested, may sue in their own names for the preservation of the property.³ In that State by another statute a church may appoint and sue by a committee,⁴ who need not be members of the church.⁵ Where a law provides that a religious association by voluntarily associating and performing other acts shall become a body corporate, the society by performing those acts obtains a corporate existence and may maintain suit in that capacity.⁶ And a compromise of a suit brought by a majority of the members is binding upon the minority.⁷ Under a statute providing that a voluntary unincorporated association may sue by its distinguishing name, a military company having such a name may sue by it.⁸ None of these acts confer upon these officers any right to sue except in cases where the stockholders or associates could before have prosecuted.⁹

§ 905. **Actions by members against their associations.**—Similar principles are followed in actions by members of unincorporated societies against the societies as govern actions by stockholders against the corporation.¹⁰ And, generally, courts will not interfere until every means afforded by the society are exhausted.¹¹ Before it interferes with voluntary associations

Maltz v. American Express Co., 1 Flipp. 611.

¹ Kingsland v. Braisted, 2 Lans. 17.

² Drumheller v. First &c. Church, 45 Ind. 275.

³ Curd v. Wallace, (1838) 7 Dana, 190; s. c. 32 Am. Dec. 85.

⁴ Hadden v. Chorn, 8 B. Mon. 70.

⁵ Humphrey v. Burnside, 4 Bush, 215, 224.

⁶ Shelburne &c. Soc. v. Lake, 51 Vt. 353.

⁷ Horton v. Baptist Church, 34 Vt. 309.

⁸ Fox v. Narramore, 36 Conn. 382.

⁹ Corning v. Greene, 23 Barb. 33.

¹⁰ Thus building associations are not exceptions to the general law governing corporations, that a stockholder can not sue at law as a stockholder. O'Rourke v. West Pennsylvania Loan &c. Assoc., (1880) 93 Pa. St. 308; s. c. 14 Phila. 145.

¹¹ Chamberlain v. Lincoln, 129 Mass.

the court must see that it is under obligation to act, and that it can effectually act for the benefit of those persons who have laid out their money in a way in which there must be difficulty in recovering it.¹ As a further illustration of this principle, where the property rights of an unincorporated church or voluntary association of persons for religious purposes are dependent on the questions of doctrine, discipline, ecclesiastical law, rule or custom, or church government, and that has been carried to and decided by the highest tribunal within the organization, the civil court will accept the decision as conclusive and be governed by it in its application to the case before it.² The result then is that the courts will not usually interfere for the purpose of protecting property rights of members of unincorporated associations, and when they do interfere the rules which the courts follow are essentially the same as those which guide them in dealing with formally incorporated bodies of the same kind.³ And although the articles of association provide for the management of the society, yet any member may resort to the courts for redress in case of fraudulent or wilful destruction of the joint property.⁴ A court will not treat a private unincorporated association as a partnership, nor declare its dissolution and divide its assets among its members on the application of a minority.⁵ Where there is nothing in the constitution of a joint-stock company which regulates the remedies of shareholders as between themselves, the general law of partnership must govern, and a shareholder or his assignee can not maintain an action against the company for goods furnished until a final settlement of the partnership account and a balance struck.⁶

70; *Lafond v. Deems*, 81 N. Y. 507; *Fischer v. Raab*, 57 How. Pr. 87; *Olery v. Brown*, 51 How. Pr. 92; *White v. Brownell*, 2 Daly, 329; s. c. 3 Abb. Pr. N. S. 318; s. c. 4 Abb. Pr. N. S. 162, 199.

¹ *Ellison v. Bignold*, 2 Jac. & W. 505.

² *Watson v. Jones*, 13 Wall. 679. And the decisions of the highest tribunals of the order of Red Men have been held binding upon the courts.

Osceola Tribe v. Schmidt, 57 Md. 98; *Anacostia &c. v. Murbach*, 13 Md. 94; *Black v. Vandyke*, 2 Whart. 309.

³ *Hirschl, Fraternities and Societies*, § 4711.

⁴ *Dennis v. Kennedy*, 19 Barb. 517.

⁵ *Thomas v. Ellmaker*, 1 Pars. Eq. Cas. 98. *Cf. Pipe v. Bateman*, 1 Iowa, 367.

⁶ *Bullard v. Kinney*, 10 Cal. 60. *Cf. McMahon v. Rauhr*, 47 N. Y. 67.

§ 906. *The same subject continued.*—Where there is a statute making an officer of the company its representative, legal proceedings between the public officer and individual members are as unobjectionable as proceedings between incorporated companies and their shareholders.¹ Accordingly the society may be so sued by a member upon a contract made by the authorized agents of the society.² And a member of a joint-stock association may maintain an action against the association or an officer thereof to recover damages for maintaining a private nuisance.³ Again, a bill filed in the name of a corporation which consisted of nine trustees, against five of the trustees in their individual capacity, is maintainable.⁴ Even at common law, a member of a mutual insurance association having suffered loss may sue the treasurer, secretary and seven members.⁵ But an act allowing suits by a joint-stock company against any person to be commenced in the name of the chairman, which it was also permissible to use in all cases where it before would have been necessary to state the names of the partners, was held not to authorize suit to be commenced by the chairman against one of the partners without making the other partners parties.⁶

§ 907. *Actions for "benefits."*—As a rule a member of a voluntary benevolent association can not seek redress in the courts for a violation of the obligation of the association concerning "benefits," until he has first exhausted the remedies provided by the rules of the association⁷, for it has been well said that mutual benefit societies never intended to be subject to petty and vexatious suits.⁸ And where a benefit is payable "while so much remained in funds," a member can not maintain a suit in the courts for his benefit, as they would presume that the corporation had determined that there was not so much in the funds, and that determination would be con-

¹ Dicey on Parties, 156.

⁵ Bromley v. Williams, 32 Beav.

² Sawyer v. Methodist &c. Soc., 10

177.

Vt. 405.

⁶ McMahon v. Upton, 2 Sim. 473.

³ Saltsman v. Shults, 14 Hun, 256.

See also Hichens v. Congreve, 4

⁴ Bethel v. Carmack, 2 Md. Ch.

Russ. 562.

143.

⁷ Poultney v. Bachman, 31 Hun, 49.

⁸ Black v. Vandyke, 2 Mart. 309.

clusive upon the courts.¹ But a suit has been entertained against the order of Red Men for benefits.² And where an order or society has not provided a tribunal within the organization or association possessing conclusive jurisdiction, a member may sue at law for weekly benefits.³ So also it has been decided that a member of the order of Chosen Friends may appeal to a court of law to enforce his rights in a benefit fund, even without first exhausting his remedies in the courts of the order, and this right can not be taken away from him by any provision in the constitution or by-laws of the order.⁴ And again where several men voluntarily associate themselves together for mutual insurance, and a loss occurs to a member of the association against which he is insured, he may bring suit against the society and ask that his loss be paid out of the funds of the association; and in case they are insufficient a ratable contribution may be required from all members of the organization.⁵ Under statutes allowing actions against the society through its officers, a member of a benevolent society may maintain an action against the treasurer for such benefits.⁶

§ 908. Actions by and against withdrawing members.—

As a general rule members withdrawing from an unincorporated society, whether going singly or in numbers, have no rights in the property of the society. Thus the seceding members of a chartered society, forming a new voluntary association, can not maintain a suit for the recovery of debts due the corporation.⁷ And the title to the church property of a divided congregation is in that part, though a minority, which adheres to the laws, usages and principles of the denomination under which the church was constituted.⁸ But

¹ *Foram v. Howard Ben. Assoc.*, 4 Pa. St. 519.

² *Logan Tribe v. Schwartz*, 19 Md. 565.

³ *Dolan v. Court Good Samaritan*, 128 Mass. 437; *Smith v. Society*, 12 Phila. 380; *Cartan v. Father Matthew &c. Soc.*, 3 Daly, 20.

⁴ *Supreme Council v. Garrigus*, (1885) 104 Ind. 133; *Bauer v. Samson Lodge*, 102 Ind. 262.

⁵ *Bromley v. Williams*, 32 Beav. 177.

⁶ *Poultney v. Bachman*, 62 How. Pr. 466.

⁷ *Smith v. Smith*, 3 Desaus. 557.

⁸ *Schnorr's Appeal*, 67 Pa. St. 138. *Vide supra*, § 99; *Roshe's Appeal*, 69 Pa. St. 462; *Harmon v. Dreber*, 1 Speer, Eq. 87; *Kniskern v. Lutheran Church*, 1 Sandf. Ch. 439; *Attorney-Gen. v. Pearson*, 3 Mer. 353; *Baker*

a contrary doctrine is held by the New York courts.¹ So also where a minority of an unincorporated lodge or secret society withdraw from the grand lodge and surrender their charter and the minority continue the organization under the old name, and have their own officers installed by the grand lodge, a court of equity will interfere to compel the withdrawing majority to turn over the lodge property to the remaining minority.² It is otherwise, however, where the charter had not been surrendered or declared forfeited by the supreme lodge.³ Again a departing member of a community of Shakers can not maintain a suit against the community for wages.⁴ And a member of a band, one of the by-laws of which provides that any member upon withdrawing shall leave all his interest with the band, who leaves it and takes his instrument with him, and refuses to give it up, may be sued in trover to recover the instrument by the remaining members.⁵ But it has been held where the grand lodge of Odd Fellows revoked the charter of a certain lodge, and appointed the plaintiff as agent to receive from the subordinate lodge all the lodge property, that the subordinate lodge was not bound by the decree of the grand body; and that neither the agent appointed to receive, nor the grand lodge itself, had any right to the property of the subordinate lodge. And it was intimated that if the members of the subordinate lodge had subscribed to a constitution of the grand lodge as well as of the subordinate lodge requiring it, public policy would not admit of the parties binding themselves by such agreements.⁶

§ 909. **Actions on subscriptions.**—A subscription to an association or partnership is merely voluntary until the society is formed, and those subscribers not consenting to the organiza-

v. Fales, 16 Mass. 487; *Stebbins v. Jennings*, 10 Pick. 172.

¹ *Petty v. Tooker*, 21 N. Y. 267; *Gram v. Prussia &c. Soc.*, 36 N. Y. 161; *Burrell v. Associate Reformed Church*, 44 Barb. 282; *Robertson v. Bullions*, 11 N. Y. 243.

² *Altman v. Benz*, 27 N. J. Eq. 331.

³ *Chamberlain v. Lincoln*, 129 Mass. 70.

⁴ *Waite v. Merrill*, 4 Me. 102.

⁵ *Danbury Cornet Band v. Bean*, 54 N. H. 524, as it was a case of dissolution where a settlement had been reached.

⁶ *Austin v. Searing*, 16 N. Y. 112; *Lamphere v. Grand Lodge*, (Mich. 1882) 11 N. W. Rep. 268.

tion are not bound.¹ Accordingly a subscription for the purpose of ascertaining whether a sufficient amount could be raised to build and form a church, is not binding where the subscriber dies before the building committee is chosen by the subscribers.² It seems, however, that if the association had been formed, and a contract for a lot or building entered into on the faith of the subscription, in the life-time of the subscriber, and with his express or implied consent, he, and, of course, his representatives, would have been bound to pay the subscription.³ A subscription to pay money to such persons as may be appointed trustees for the erection, is merely voluntary and without consideration; but if upon the faith of the subscription trustees are afterward appointed and incorporated, and expenses incurred, of which the subscriber had knowledge, and to which he assented by paying part of the amount subscribed, the law will imply a promise to pay the remainder, and an action will lie by the corporation to recover it.⁴ So also, generally, a contract of subscription for the purpose of building a church, the congregation having already been formed, and the promise being to pay the building committee when appointed, may be enforced by the committee.⁵ And again, the other members of a building committee appointed by an unincorporated religious association to superintend the erection of a church have been allowed to maintain an action to enforce a promise by one of their number to pay a certain amount toward the expenses of the edifice although they had finished it and been discharged.⁶ But if there is no express promise to pay trustees, the action must be brought in the

¹ Hedge's Appeal, 63 Pa. St. 279.

² Phipps v. Jones, (1853) 20 Pa. St. 260.

³ Phipps v. Jones, (1853) 20 Pa. St. 260.

⁴ Farmington Academy v. Allen, (1817) 14 Mass. 172; s. c. 7 Am. Dec. 201; Phillips Academy v. Davis, 11 Mass. 113; s. c. 6 Am. Dec. 192; Cross v. Jackson, 5 Hill, 478.

⁵ Chambers v. Calhoun, 18 Pa. St. 13; s. c. 55 Am. Dec. 583. Even by the residue of that committee, the

promisor being one of the committee.

⁶ It was of no consequence that the congregation had appointed another committee to wait upon the promisor, for they could not transfer this *chose in action* to another committee, so as to enable them to sue in their own names. Chambers v. Calhoun, (1858) 18 Pa. St. 13; s. c. 55 Am. Dec. 583; Townsend v. Goewy, 19 Wend. 424.

names of all the other subscribers.¹ And it has been held that the treasurer of an unincorporated association can not maintain an action upon a subscription, although it be payable to the treasurer of the association.² The members of an association are liable for goods furnished their agent with their concurrence, but the party furnishing the goods can not sue upon the subscription of the members of the association.³ A corporation formed from an association of individuals for business purposes, without the consent of a subscriber to the association, can not recover upon the subscription for money laid out and expended by itself for the use of the defendant, as there is no privity between the parties.⁴

§ 910. Actions to prevent illegal and ultra vires acts.—

The remedies for fraudulent, illegal and *ultra vires* acts by the officers and managers of voluntary and unincorporated associations, are governed by the analogies of the law of corporations.⁵ Thus a diversion of the funds from the objects designed, without the consent of the contributors, will be restrained.⁶ And a fund raised by an association for a specific purpose can not be devoted by the members of the association while a single one objects, to any other object. The diversion amounts to an *ultra vires* act and may be enjoined.⁷ So also the members of a joint-stock company may bring actions to remedy the fraud of the trustees.⁸ And again the trustees are liable in tort for their frauds on the company.⁹ Furthermore, trustees receiving gifts are liable therefor to the company,¹⁰ and they can not sell to the company.¹¹ The treasurer may be compelled to pay over funds belonging to the com-

¹ Cross v. Jackson, 5 Hill, 478.

² But that such an action might have been maintained if the subscription had been made payable to him by his individual name, and in that case the description of him as treasurer of the society would not affect the right. Ewing v. Medlock, 5 Port. 82.

³ Ridgely v. Dobson, 3 Watts & S. 118.

⁴ Machias Hotel Co. v. Coyle, (1853) 35 Me. 405; s. c. 58 Am. Dec. 712, where the subscriber had not promised to pay the corporation anything.

⁵ Waterbury v. Merchants' Union Ex. Co., (1867) 50 Barb. 157.

⁶ Penfield v. Skinner, 11 Vt. 296. Morton v. Smith, 5 Bush, 467.

⁷ Abels v. McKean, (1867) 18 N. J. Eq. 462.

⁸ In such proceedings the other members are not proper parties. Boody v. Drew, (1874) 46 How. Pr. 459.

⁹ Dennis v. Kennedy, (1854) 19 Barb. 517.

¹⁰ In re Fry, (1860) 4 Phil. Rep. 129.

¹¹ Robbins v. Butler, (1860) 24 Ill. 387.

pany.¹ And the treasurer of a voluntary association for charitable purposes will be decreed to account for moneys in his hands, to pay them over according to the intention of the association.² While mere contributors to a fund creating a trust for mere charitable purposes, can not call the trustees to an account for a breach of trust, they may if they have an interest in the trust.³ The members of a voluntary company for profit, need not make good to the officers, debts paid by the latter, growing out of *ultra vires* acts.⁴ For if a member has not participated or acquiesced in the *ultra vires* act, he is not liable thereon;⁵ although the officers themselves are liable to third persons.⁶ If the directors of a mutual insurance company misapply money specifically collected for the purpose of paying a certain policy-holder, the company is a necessary party to a suit by him against the directors.⁷ Less than all the shareholders in a joint-stock company, may sue in behalf of themselves and other shareholders for the purpose of compelling the directors of the company to refund moneys improperly withdrawn by them from the company and applied to their own use; and to such a case an act of parliament providing that all suits by or on behalf of the company shall be prosecuted in the name of the chairman of the directors does not apply.⁸ The infidelity or misconduct of some or even all of the trustees or managers of an association doing business as an express company, affords no ground for taking away the rights of the shareholders who constitute the company, either by dissolving it, or taking away its management, or placing it in the hands of an officer of the court. In such a case the principles of remedial or preventive justice go no further than to enjoin the misconduct or remove the unfaithful officer.⁹

¹ Sharp v. Warren, (1818) 6 Price, 181.

² Penfield v. Skinner, 11 Vt. 296.

³ Ludlum v. Higbee, 11 N. J. Eq. 342.

⁴ Crum's Appeal, (1878) 66 Pa. St. 474.

⁵ Roberts' Appeal, (1880) 92 Pa. St. 407.

⁶ Sullivan v. Campbell, (1829) 2 Wall. 271.

⁷ Brown v. Orr, 112 Pa. St. 233.

⁸ Hichens v. Congreve, 4 Russ. 562.

⁹ Waterbury v. Merchants' Union Ex. Co., (1867) 50 Barb. 157.

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